

INQUIRY INTO THE CENTENARY HOUSE LEASE

Before the Hon David Hunt AO QC

Held at Level 5, 55 Market Street, Sydney

On Friday, 3 September 2004 at 10am
(Day 15)

1 MR SACKAR: Mr Commissioner, could I raise a matter,
2 subject to any matter you wish to raise, before my friend
3 continues to examine Mr Ferrari. We make no criticism of
4 the Commission, naturally, but we are a bit concerned
5 about Mr Egan's statement. May I just indicate what our
6 particular concerns are. No doubt some of them are shared
7 with everybody, namely the time within which people need
8 to do things.

9
10 Mr McCann was to give evidence in the very near
11 future. His wife is extremely ill and he needs to
12 accompany her to have some treatment. That would mean
13 that he cannot give evidence between Wednesday of next
14 week and Wednesday of the following week. It may well be
15 that he is the person, principally, who would have to
16 address any matters raised by Mr Egan.

17
18 THE COMMISSIONER: And to instruct you, no doubt.

19
20 MR SACKAR: And to instruct me in what to ask Mr Egan.
21 Now, of course, a lot turns upon, naturally enough, not
22 only the timing of Mr Egan but the content of Mr Egan.
23 There is no point me speculating, because it is wasteful
24 of time. One could see various possibilities, and,
25 depending upon the approach taken, little time or a lot of
26 time needed to address the issues.

27
28 I know that it is very much probably out of
29 everybody's hands, but I just thought that we needed to
30 raise our concern in the immediate short term, and now,
31 unfortunately, Mr McCann's likely lack of ability to speak
32 to me, at least, for a little while. I am in a position
33 where, given what I know about his wife's illness, I don't
34 feel, quite frankly, that I can expect him, in the next
35 week or so, to address issues, even if they were
36 forthcoming.

37
38 Now, of course, if he and Mr Egan were the last two
39 witnesses, then there is more than enough to do next week.
40 I am not suggesting for a moment --

41
42 THE COMMISSIONER: That's what I was going to
43 suggest - that we could put the valuation people down a
44 little bit. Do you know anything about it, Mr Foster -
45 when Mr Egan's report may be available?

46
47 MR FOSTER: It is a difficult question. On what I do

1 know, I would be hopeful to have something to my learned
2 friends early next week, by which I mean in the first day
3 or two --

4

5 THE COMMISSIONER: That doesn't give Mr McCann much
6 opportunity to look at it in these new circumstances. Can
7 we rearrange to put the valuation evidence towards the
8 end?

9

10 MR FOSTER: Yes. What I just said I say on the basis of
11 what I have been told. I am somewhat reluctant to take
12 personal responsibility for that beyond saying it is what
13 I have been told.

14

15 THE COMMISSIONER: Nobody is asking you to. Don't worry,
16 Mr Foster.

17

18 MR FOSTER: On the basis, though, that we get something
19 in that time frame, in the light of what is occurring with
20 Mr McCann, I have indicated to Mr Sackar that, as I
21 understand Mr McCann's situation, we ought to make every
22 effort to respect it.

23

24 THE COMMISSIONER: Yes.

25

26 MR FOSTER: What I would have in mind is having Mr McCann
27 come as soon as he can, having regard to those
28 circumstances. It looks like that will have to be a bit
29 later than we would have liked, but not much later,
30 because we are going to have witnesses next week, at least
31 as far as probably Wednesday, I would think, because we
32 have Mr Hogg on Wednesday. What we could do is bring
33 Mr Egan as soon as Mr Sackar might indicate to me that, in
34 the light of what Mr Egan provides, he is in a position to
35 deal with him, and then have Mr McCann come subsequently,
36 because that seems to be the most efficient way of using
37 the time.

38

39 THE COMMISSIONER: Yes.

40

41 MR FOSTER: Then, if Mr Egan needs to come back to
42 respond to Mr McCann, then we can do so.

43

44 THE COMMISSIONER: Mr McCann would have to see Mr Egan's
45 report before he could give evidence --

46

47 MR FOSTER: Of course --

1
2 THE COMMISSIONER: -- to make that worthwhile. May I
3 suggest this to you: we are getting into the situation
4 where people may be starting to look at what they are
5 going to say later on, and they would want to prepare some
6 written material. The time would be well spent if we do
7 have to have a pause in the hearing until Mr McCann
8 becomes available again and then we can bring up Egan and
9 McCann and perhaps Jeffress.
10
11 MR FOSTER: I think Jeffress can come earlier.
12
13 THE COMMISSIONER: Yes. We are only dealing with what he
14 did, rather than what perhaps some people may think he
15 should have done.
16
17 MR FOSTER: That won't take long. Mr McCann, of course,
18 was involved in the facts as they were unfolding, but he
19 is also, although out of the business he was once in and
20 was certainly in back in '92, still, nonetheless, the sort
21 of person that my learned friend would wish to use as an
22 expert to deal with Mr Egan. If what I have outlined is
23 broadly acceptable, that is the way that we would see it
24 as fairly dealing with the problems. There is an
25 acceptance that Mr Sackar's client and others, indeed,
26 ought to have sufficient time to consider what it is that
27 Mr Egan says, firstly, and to obtain instructions in
28 relation to it.
29
30 THE COMMISSIONER: Yes.
31
32 MR FOSTER: We are accepting of that. We are just
33 somewhat in the hands of others in respect of putting
34 Mr Sackar in that position.
35
36 MR SACKAR: Could I simply say, without spending too much
37 time on it, that seems perfectly sensible and reasonable.
38 I have a personal difficulty in the week of the 27th, but
39 I don't put it as an obstacle to the matter proceeding --
40
41 THE COMMISSIONER: The 27th of September?
42
43 MR SACKAR: Yes.
44
45 THE COMMISSIONER: I hope we are not still hearing
46 evidence then.
47

1 MR SACKAR: I would anticipate we would not be, because
2 we have three full weeks, as it were. One doesn't know
3 what is going to be in Mr Egan's report, and so I will
4 reserve my position in relation to that.
5
6 THE COMMISSIONER: Mr Sackar, may I simply say I accept
7 wholly the problem that you face and I am not going to
8 force you to deal with Mr Egan's report without access to
9 Mr McCann.
10
11 MR SACKAR: Thank you. I haven't addressed the question
12 of how you want to hear from us in the end.
13
14 THE COMMISSIONER: I was hoping we might get a fair bit
15 in writing.
16
17 MR SACKAR: I would anticipate, from my own part, I
18 think, minimising the oral submissions, only because it is
19 going to be difficult, probably, in a confined space and
20 time, to do justice to some of the points. It may be that
21 you would prefer largely written with very short oral
22 submissions. By that, I mean two hours each, or some
23 limited time. If for any reason some of us thought it was
24 necessary, we could raise that question and you could
25 determine whether it would be of use.
26
27 THE COMMISSIONER: I don't want to set time limits at
28 this stage.
29
30 MR SACKAR: No.
31
32 THE COMMISSIONER: You would be able, or your junior,
33 perhaps, to start drafting out material with which you are
34 already familiar, and you can deal with the valuation
35 issue at the end of those submissions.
36
37 MR SACKAR: Yes. That seems --
38
39 THE COMMISSIONER: With word processors today you can put
40 them where you like, but you can prepare them later.
41
42 MR SACKAR: I think I have said all I need to say.
43 Perhaps we will just get on with it and, hopefully, things
44 will look after themselves.
45
46
47

1 <PAUL LOUIS FERRARI, on former oath:

[10.10am]

2
3 MR WARD: Before Mr Foster recommences, may I seek leave
4 to appear for Mr Ferrari in these proceedings. My name is
5 Ward. The basis of the application, Commissioner, is that
6 in the course of examination of Mr Ferrari on Friday of
7 last week some questions were put by Mr Foster which
8 raised the possibility that at the conclusion of this
9 hearing, counsel assisting may make submissions or, as
10 Commissioner, you may be invited to make findings as to
11 Mr Ferrari's conduct in 1992, as to how well he carried
12 out his tasks within the APG.

13
14 There was also some questioning on Friday which
15 suggested that perhaps Mr Ferrari's evidence to this
16 Commission had been less than frank, specifically one
17 instance in the transcript, page 853, where the question
18 was specifically put to Mr Ferrari that his earlier
19 evidence had not been the truth.

20
21 THE COMMISSIONER: Yes, Mr Ward, I have stated throughout
22 this inquiry that people who are fearful of unfavourable
23 findings will get leave to at least be represented while
24 they give evidence. Whether they take any other part
25 throughout the hearing is another matter, depending on the
26 nature of the evidence that is at issue. However, you
27 certainly have leave to appear for him during the course
28 of his evidence.

29
30 MR WARD: Thank you, Commissioner. Could I indicate that
31 I don't anticipate that there would be any active part
32 taken beyond Mr Ferrari's evidence, but there may be a
33 desire to deliver a written submission at the conclusion.

34
35 THE COMMISSIONER: Yes, certainly. Thank you.

36
37 <EXAMINATION BY MR FOSTER CONTINUING:

38
39 MR FOSTER: Q. Mr Ferrari, it is a while since we last
40 met, but I think I was asking you about your note that you
41 had made of your meeting with Mr Jeffress in February of
42 1992. Do you recall that?

43 A. I do.

44
45 Q. I think that is as far as we had arrived. Do you
46 have a copy of that note in front of you?

47 A. Yes.

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Q. I think you helped us with the interpretation of it last time you were here.

A. Yes.

Q. The first portion of the note says:

They wanted 10.5 per cent - as projected over last 10 yrs.

Do you see that?

A. Yes.

Q. Is that something Mr Jeffress told you at this meeting?

A. I think it would have been. I think the notes that I have taken there are most probably my jotting down in note form of things that Mr Jeffress was saying.

Q. Did he then say:

** return to market was offered as sop. to bring 10.5% [arrow down] to 9.
* comparison in City 6.8%.*

A. I suspect they might be two separate statements.

Q. All right. So:

** return to market was offered as sop. to bring 10.5...*

There is an arrow, but it means down to 9; is that right?

A. That's right.

Q. You understood, by the time of this meeting, didn't you, that the market reviews in the proposal that was to go forward from here was a market review with what is commonly known as a ratchet clause, and it had these elements: firstly, it was to recur only on the occasions stipulated for in the lease, or proposed lease; secondly, it could not go below 9 per cent; thirdly, it might go above 9 per cent; and, fourthly, it could only be activated by the landlord?

A. I suspect I understood that at the time. But I think, even if I had not, I suspect it would have been part of what Mr Jeffress was presenting to us at that

1 point in time.

2

3 Q. The effect of what Jeffress told you on that point
4 was this, was it not: the landlords had wanted
5 10.5 per cent, and that he had managed to, as it were,
6 convince them to come down to 9, but only on terms that a
7 market review clause of the type I just put to you was
8 included in the lease?

9 A. That was the impression that he gave, yes.

10

11 Q. In other words, that one was traded off against the
12 other?

13 A. Yes, I presume trade-off is an appropriate term to
14 use. I think - I seem to recall that the way it was put
15 to me was that any inflator less than 10.5 per cent was
16 likely, in people's minds, to have the result of leaving
17 the rent behind the market, and the choice and agreement
18 on 9 per cent, according to the views at the time, was
19 going to have that effect, and so the other side sought
20 this review mechanism as a way to ensure that that didn't
21 happen.

22

23 Q. What you were told, in effect, was that was the way
24 in which the negotiators on behalf of the landlord was
25 putting the lease; would you not agree?

26 A. I believe so.

27

28 Q. Then there is this:

29

30 ** comparison in City 6.8%*

31

32 and then there is a line down to "12 years", I think?

33 A. Yes.

34

35 Q. What were you being told about that? What did he say
36 about that that caused you to make that note?

37 A. I must say, I can't remember.

38

39 Q. Then there is a box with a - I am sorry, I won't say
40 that to you. What is in that box, again?

41 A. I think it says "straight".

42

43 Q. Yes. And then another box says:

44

45 *Start rent still to be determined.*

46

47 Is that right?

1 A. Yes, that's right.
2
3 Q. Then you have got the other matters you took us
4 through:
5
6 *Barton is a more exp. market.*
7
8 Is that the note?
9 A. I think so, "exp. market", I think "expensive", yes.
10
11 Q. And more expensive than what?
12 A. I think than certainly some other parts of the
13 ACT. Whether it related to city or whether it related to
14 Woden, I couldn't tell you at this point in time.
15
16 Q. But more expensive than something else, and he may
17 have indicated to you what it was or he may not; he may
18 have simply said it was a more expensive market; is that
19 the point?
20 A. Yes.
21
22 Q.
23 ** supply is constrained.*
24
25 Meaning that it is controlled by development controls; is
26 that right?
27 A. Yes, I think so. It might also mean that there
28 wasn't very much development in Barton and so whilst it
29 was an attractive location to a number of agencies, there
30 weren't a lot of opportunities to actually move in there.
31
32 Q. That was the position, as you understood it, was it
33 not?
34 A. Yes, I believe so.
35
36 Q. And, in a sense, it is, to your common sense
37 understanding of matters, somewhat artificial to talk in
38 terms of a market for rents in Barton as at 1991/1992,
39 isn't it?
40 A. No, I'm not quite sure what you mean by that
41 question.
42
43 Q. Well, because it was constrained by development
44 controls of a particular kind; agreed?
45 A. Yes.
46
47 Q. And the type of tenant that would be allowed in there

1 was very restricted; agreed?
2 A. No, I don't think so.
3
4 Q. In the Parliamentary Triangle, would you not accept
5 that the preference of the planners, as you understood it,
6 in '91 and '92 was to have Commonwealth Government
7 authorities, organisations and departments, occupying the
8 Parliamentary Triangle area?
9 A. That's right.
10
11 Q. So, what I was putting to you was that the
12 opportunities for non-governmental authorities of a
13 commercial character to take up space in Barton was
14 virtually zero at that time?
15 A. Of non-Commonwealth?
16
17 Q. Of non-government - be they Commonwealth or ACT?
18 A. Non-government. Well, I'm not sure that there was
19 much demand by non-government for office accommodation,
20 apart from - the areas in - the buildings in Barton. Many
21 of them were there primarily as national headquarters for
22 various organisations, which I would call a
23 non-government.
24
25 Q. Such as? What do you have in mind?
26 A. I think National Farmers Federation - national
27 headquarters. I mean, that was one of the planning
28 criteria for buildings in a number of areas of Barton,
29 that they were basically - Salvation Army is another one
30 that comes to mind.
31
32 Q. Development in Barton up to that point, though, had
33 been, as is noted here, quite constrained, had it not?
34 A. Oh, look, I don't think I'm qualified to really
35 answer that question. I think there was quite a bit of
36 development happening in Barton at that time.
37
38 Q. You have got another note:
39
40 * *market at the moment is still [arrow] --*
41
42 meaning going up, I assume --
43
44 * *at about 10 per cent.*
45
46 A. Yes.
47

1 Q. That was which market, if any, that he was referring
2 to?
3 A. I'm not sure.
4
5 Q. Well, it wasn't just the market in Barton, was it?
6 A. Well, it might have been. It might have been in the
7 ACT overall. I really don't know, now, looking at that
8 comment, as to what that one was meant to refer to.
9
10 Q. Then there is a reference to contribution to fitout.
11 Was the suggestion being made by him, as you understood
12 it, that the fact that there had been a contribution to
13 the fitout agreed at \$400,000 had justified a higher rent
14 than might otherwise have been paid without that
15 contribution?
16 A. No, no, I think the point that he was making was that
17 whilst in this proposal a long-term figure of 9 per cent
18 had been adopted. One way of looking at it was to build
19 into the transaction the \$400,000 contribution to fitout,
20 which was an upfront fee, and that effectively was the
21 equivalent of an even lower inflator than 9 per cent.
22
23 Q. Right.
24 A. So, you know, the equivalent of a \$400,000 upfront
25 payment was the same as no upfront payment of \$400,000 but
26 an inflator of something, I think, between 8 and 9 per
27 cent.
28
29 Q. Did he tell you that he had done some work on that to
30 work out what the value, as it were, over time of that
31 \$400,000 upfront payment was?
32 A. I can't remember if he told me that, but I do recall
33 coming away with some indication of the relative scale of
34 what that upfront \$400,000 payment was worth in inflator
35 terms, so perhaps he did, but I can't remember for
36 certain.
37
38 Q. But the point was, nonetheless, that he was trying to
39 inform you that the fact that there had been an agreement
40 to pay this level of contribution to fitout was a matter
41 to take into account when assessing the rent and the
42 escalation of the rent?
43 A. Yes.
44
45 Q. What was the context in which he made that point to
46 you, if you can recall?
47 A. I can't recall. I can speculate that I think that it

1 was part of his response to the question that we were
2 putting to him, which was has the advice that he provided
3 in November of 1991 altered, and I think in responding to
4 that overall question, he made a whole series of points
5 about the conclusions that he had arrived at in November
6 1990 - sorry, 1991, and where those conclusions stood at
7 this point in time, which was at the end of February,
8 1992.

9

10 Q. Did you not also ask him at this time to explain to
11 you the reasoning as to why he had allowed his report to
12 go forward to the APG in the terms that he did - that is
13 to say that he did not advise the APG that this was a
14 transaction that was not a reasonable one or an
15 appropriate one from the Commonwealth's point of view?

16 A. I don't recall a specific discussion on that
17 particular point. I think my feeling at the time was that
18 if there was something improbable or inappropriate about
19 the whole arrangement, then the advice that had been
20 sought from the valuers would have elicited that sort of
21 response.

22

23 Q. Including the advice you were asking for in February
24 '92?

25 A. Quite possibly. I can't say I recall putting that
26 particular point to Mr Jeffress, but yes, it is quite
27 possible.

28

29 Q. Would you not accept that it seems that this point
30 that was being made about the contribution to fitout was a
31 matter that went to justify the original terms, rather
32 than a matter which was logically relevant to considering
33 whether his advice might have changed between November and
34 February?

35 A. I think what Mr Jeffress was attempting to do,
36 because neither - sorry, I don't know whether Bruce Holden
37 had been in the position he was at this point in time when
38 the advice was originally sought, but I don't - if he was,
39 I don't think he had a specific role in that, and I
40 certainly hadn't been. I think Mr Jeffress was taking us
41 through the rationale of the advice that he provided.

42

43 Q. Right. Originally?

44 A. Originally, yes. Now, whether that was in response
45 to our specific questioning of him, or whether that was
46 something that he just did in response to the question
47 that we were asking him at that time, I don't recall.

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Q. Mr Holden, by the way, was he someone on secondment, as it were, to the position he was in at this time?

A. He was a fairly senior Canadian government officer who spent some time working on secondment on exchange, really - on exchange with the Commonwealth Government.

Q. He had not been in the position that he was in in February 1992 for very long, had he?

A. I don't recall for certain, but I think he may have moved to that position in about July 1991, but I couldn't be certain about that.

Q. He has gone back to Canada, as far as you know, has he?

A. Yes, in fact I think some time in 1992 he returned to Canada.

Q. So he was on exchange for, what, approximately a year?

A. Two years.

Q. Two years. Did he always work in the APG when he was on exchange in Australia?

A. No, I think in the first 12 months that he was there he worked - he was the head of Australian Estate Management, which was the estate-owning part of the property area of the Commonwealth Government. Then I think in mid-1991 he then took this position in the other side of the Commonwealth property area.

MR FOSTER: Commissioner, I haven't tendered this original note, but I would wish to do so. In the circumstances, I would also wish to tender the pad on which it is to be found, in order to indicate where the note is in the pad and how the pad is constructed and how the pad was kept. May I do that? I don't think, at the moment, there is anything else that I am particularly interested in, but I would wish to tender it for those purposes.

THE COMMISSIONER: What do we do about copying it?

MR FOSTER: Everyone has copies of it. At this stage I tender the whole pad, but the page in which I am interested is the one which is flagged and dated 28 February 1992.

1
2 **EXHIBIT #50 ORIGINAL NOTE PAD OF PAUL FERRARI,**
3 **BARCODED EXH.050.000**
4

5 MR FOSTER: Q. By the way, was Mr Hurrell at this
6 meeting on the 28th?

7 A. I don't think so. I think Mr Jeffress attended by
8 himself.
9

10 Q. Did you ask Mr Jeffress to confirm what he told you
11 at this meeting in writing?

12 A. No, I don't believe so.
13

14 Q. Was there a reason for that?

15 A. Well, I think that the purpose of the meeting was to
16 obtain from him his views on whether or not his earlier
17 advice had changed. The outcome of the discussion was
18 that it hadn't. So I think, on that basis - I don't think
19 there was a need to - well, didn't think at the time that
20 there was a need to document that, because his advice
21 wasn't changing. I think it might have been quite
22 different had he actually indicated some change in his
23 views. But, since he didn't, there didn't appear to be
24 any need to seek anything written in relation to it.
25

26 Q. Would you not accept that the occasion that you
27 arranged in which this discussion took place was quite an
28 important one for your consideration of this transaction?

29 A. In terms of coming to a view myself about what was
30 proposed, then, yes.
31

32 Q. Would you not accept now that it would have been
33 prudent to obtain something in writing from Mr Jeffress as
34 to the matters he conveyed to you at that meeting?

35 A. Given the relevance that seems now to be placed on
36 it, then, yes, indeed.
37

38 Q. Well, apart from the relevance that we might be
39 placing on it, looking back on it, it being the occasion
40 that it was, do you not think it was prudent for you to
41 get his confirmation in writing of the matters that you
42 had discussed with him?

43 A. Well, it probably would have been prudent to have
44 done so, yes.
45

46 Q. You did not have prepared and put on the file a
47 formal, typed file note, either, did you, of this meeting?

1 A. No, I didn't.
2
3 Q. In fact, the only record that the APG has of that is,
4 in effect, your note pad that I just tendered?
5 A. I suspect so.
6
7 Q. And that is not in the possession of the APG, or
8 hadn't been; it was in your possession; is that right?
9 A. That's right.
10
11 Q. That's been the case since you retired from the
12 public service, hasn't it?
13 A. Yes.
14
15 Q. Was the reason that you called this meeting that you
16 were aware that there was some indication that commercial
17 rent growth rates were slowing in Canberra?
18 A. That wasn't the reason we called the meeting, no.
19 The reason that we called the meeting was that I had
20 looked through what I could establish about what was
21 proposed, and had a discussion with Mr Holden about it.
22 We came to the conclusion that critical in the whole
23 scheme of things was the valuation advice, and so we came
24 to the conclusion that it would be important to talk to
25 the valuer as we approached the time when documentation
26 was to be signed off, et cetera, to ensure that his advice
27 hadn't changed. Now --
28
29 Q. Well, did - I am sorry.
30 A. -- I think that at that time, by that time, I had
31 become aware of some knowledge of prices in the Canberra
32 market, but I wasn't a valuer, and so I felt the need, and
33 Mr Holden felt the need for us to talk to the valuer to
34 make sure that his advice hadn't changed.
35
36 Q. Was at least one of the reasons that you felt that
37 need this awareness that you had that there had been some
38 indication that commercial rental growth rates had been
39 slowing down in Canberra?
40 A. That may have been one of the contributing factors,
41 but my knowledge of that would have been pretty
42 superficial.
43
44 Q. There is no doubt in your mind, having regard to your
45 note, is there, that the ratchet clause and market review
46 mechanism was discussed at this meeting you had with
47 Mr Jeffress on 28 February 1992?

1 A. There was certainly some reference to it, indeed.
2 And I say that because of the reference to it on the
3 second line of the note - not so much because I recall the
4 discussion.

5
6 Q. But the note seems to make reasonably clear that that
7 subject matter was discussed at that meeting, does it not?

8 A. Yes.

9
10 Q. Have you got a copy of your statement for this
11 inquiry with you there?

12 A. Yes.

13
14 Q. Could I ask you to just have a look at paragraph 31,
15 please. Would you read that to yourself and let me know
16 when you have done that, so that I can ask you some
17 questions about it.

18 A. Yes.

19
20 Q. Who told you the material that appears in the first
21 sentence of paragraph 31 - that is, that in the
22 negotiations referred to there it had been made clear by
23 the other side that finance for the building was not going
24 to be made available unless the proposed development was
25 risk-free to the financier?

26 A. I can't say I recall specifically, but I suspect it
27 was probably from some of the oral briefings provided by
28 Dominic Collins and Robert Ireland.

29
30 Q. In that period before Dominic Collins left and as you
31 were taking over the responsibility for the file?

32 A. I think so.

33
34 Q. What did you understand the expression "risk-free to
35 the financier" to mean, when that was conveyed to you in
36 that context?

37 A. Well, my understanding was that the financier wanted
38 to see and have an absolute understanding of what the
39 minimum cash flow would be over the life of the lease.

40
41 Q. Do you mean by that that there was to be an
42 arrangement as between landlord and tenant which was of
43 such certainty that the financier could see year by year
44 precisely what the figures thrown up by the rent would be?

45 A. Yes.

46
47 Q. Did someone tell you that the requirement for that

1 kind of certainty had been dictated by the financiers or
2 the financier that ultimately was to take it up?

3 A. I think so.

4

5 Q. Who told you that?

6 A. Well, as I say, I think - I thought that was the
7 question I answered a minute ago. I think that would have
8 been - I think that would have been Robert Ireland or
9 Dominic Collins or both. I mean, I don't have a clear
10 recollection of an occasion when I was told that, but in
11 this time there was an extraordinary amount of information
12 being conveyed to me about this project as well as others,
13 and my recollection is that at that time, that's when I
14 understood that they were the circumstances of the other
15 side to this transaction.

16

17 Q. Do we take it from what you have written in that
18 paragraph I just drew your attention to, and from your
19 last few answers, that you formed the view, after
20 discussions with Mr Collins, Mr Ireland and reading the
21 file, that the terms upon which the rent would be
22 calculated for the Centenary House transaction were, first
23 of all, dictated by the financier and, secondly, were, in
24 effect, a take-it-or-leave-it as far as the government was
25 concerned?

26 A. There are different bits to that question. I'm not
27 quite sure --

28

29 Q. There are two bits, I think.

30 A. Could you take me to the first one again, please.
31 Sorry, I am trying to follow this as you are saying it.

32

33 Q. No, that's fine, Mr Ferrari. Do we take it from what
34 you have written in that paragraph - that is, paragraph 31
35 of your current statement - and the answers you have given
36 to the last few questions that I asked you, that you
37 formed the view, when you came to the matter in February
38 1992, that the terms upon which the rent would be
39 calculated and escalated were, first of all, dictated by
40 the financier that was to finance the transaction?

41 A. No.

42

43 Q. You didn't form that view?

44 A. No. My understanding was that that was - whilst the
45 model was something that had been proposed, and I'm not
46 sure by whom, but proposed and agreed, the actual figures
47 that would be built into it were something that was going

1 to be - that was arrived at on the basis of negotiation
2 between the two valuers - the valuers on either side.

3
4 Q. Secondly, what I put to you was that on the basis of
5 those matters I referred you to, the APG and the
6 government, or the Commonwealth, was in a position where
7 they had to take it or leave it, in the sense that there
8 was a level below which, in terms of rent and escalation,
9 this transaction would never be acceptable to the
10 landlord?

11 A. Yes, I think that's right. Yes.

12
13 Q. And so the room for negotiation was, as you
14 understood it, only above that level?

15 A. Yes.

16
17 Q. Did you understand that to be the case because of the
18 dictates of the financier that was to finance the
19 transaction?

20 A. That was the understanding I had, yes.

21
22 Q. Did you know, for example, that the transaction as
23 contemplated involved year by year throwing up surplus
24 funds for use by the ALP as it saw fit, over and above the
25 commitments that it would be undertaking in respect of the
26 building?

27 A. No.

28
29 Q. Was that contrary to what you thought the position
30 was, if it be the fact?

31 A. No, I don't think so, because the figure that the
32 other party might accept, and what made that up, was up to
33 them. From the Commonwealth's perspective, what the
34 Commonwealth would be prepared to pay in such a
35 transaction was something about which were relying on
36 valuation advice, which wouldn't have taken a factor like
37 that into account in any way shape or form.

38
39 Now, the way I saw it, if formal valuation advice on
40 behalf of the Commonwealth came up with a number that
41 satisfied whatever objectives the other side had, then
42 that was fine - we could reach agreement and proceed. But
43 I didn't think for one minute that there was anything in
44 the valuation advice that would have reflected anything
45 other than the overall need for the other side to have
46 certainty in the arrangement.

47

1 Q. Did you know, for example, that the cash flows as
2 prepared for this transaction finally in conjunction with
3 the financier resulted in the building being paid off over
4 the 15 years, completely?

5 A. I didn't know that, no, but I presumed that that may
6 well have been one of the consequences of the arrangement
7 that was being considered.

8
9 Q. That's a matter that wouldn't have concerned you at
10 all - that the Commonwealth was paying rent at such a
11 level that it enabled the owner to pay off the building
12 entirely over 15 years?

13 A. No, it wasn't a concept that was - with which I was
14 unfamiliar. In fact, there were a number of projects in
15 that time period being developed for Australian Taxation
16 Office where that appeared to be the consequence of
17 arrangements that were being put in place all around the
18 country by the Commonwealth Government.

19
20 Q. But weren't those buildings where the reversion went
21 back to the Commonwealth?

22 A. No. No. They were - no, definitely not. They - I
23 can't remember how many there were, but there was quite a
24 number of them being pre-committed around the country for
25 the Tax Office at that time, for which I had had some
26 involvement in the latter half of 1991 in the other
27 position that I was holding at that time, and no, they
28 were all privately-owned buildings with a fixed period of
29 occupation by the Commonwealth, and no commitment beyond
30 that for the Commonwealth to continue to occupy.

31
32 Q. But are you saying in that last answer that you were
33 so familiar with the financial workings of those
34 transactions from the other side's point of view that you
35 knew that the buildings were being paid off in the
36 entirety over the term of the lease?

37 A. In relation to those other buildings?

38
39 Q. Yes.

40 A. Didn't know that with any certainty at all, but it
41 seemed to be not an unreasonable conclusion to reach,
42 because many of these buildings were being built in
43 locations which didn't normally have the sort of demand
44 for the size of office accommodation that was being
45 required, and so should the Commonwealth, at the end of
46 the initial term in those leases, decide that it didn't
47 want to continue to occupy them, then the feeling was at

1 the time that it was unlikely that a developer of those
2 buildings might have, in a number of cases, been able to
3 find replacement tenants. So the conclusion that people
4 reached was that the arrangement that the Commonwealth was
5 committing to with those buildings was likely to be one
6 which largely paid the building off in the period of the
7 tenancy.

8
9 Q. That's because, as far as you understood it, there
10 was a very good chance that the buildings would be
11 untenantable at the end of the Commonwealth lease?

12 A. If the Commonwealth decided it didn't want to
13 continue its tenancy.

14
15 Q. Well, there was no prospect of that occurring at
16 Barton, looking forward in 1991/1992 - that is to say that
17 this building would become untenantable, was there?

18 A. No. No, I wouldn't presume so, no.

19
20 Q. Provided the rent was at a market rate at the end of
21 the lease?

22 A. Mmm-hmm.

23
24 THE COMMISSIONER: Q. Do you mean "yes"?

25 A. I think so.

26
27 Q. It is very difficult, later on, reading a transcript,
28 when you see "mm-hmm", knowing whether it means "yes" or
29 "no".

30 A. I apologise.

31
32 MR FOSTER: Q. Did you understand, or form the view, at
33 least, that this transaction was going to be entirely
34 risk-free for the owner as well as the financier, when you
35 looked at it in 1992?

36 A. I think I would have presumed that that was the case.

37
38 Q. Well, if it was risk-free for the owner and risk-free
39 for the financier, why wouldn't the government want
40 ownership of the building at the end of the lease, as it
41 had required at Tuggeranong?

42 A. I don't know.

43
44 Q. Wouldn't that make sense to you, as someone charged
45 with the responsibilities you had at that time?

46 A. Well, I'm not quite sure what you mean by "charged
47 with responsibilities" at that point in time. That wasn't

1 the way the transaction had been negotiated. As far as I
2 understood, I don't think there had been any suggestion of
3 a reversion to ownership by the Commonwealth and --
4

5 Q. No, there hadn't. I'm not suggesting there had been.
6 A. -- indeed, that --
7

8 Q. What I am suggesting is perhaps there should have
9 been, given the terms of the transaction that had been
10 agreed to up to that point in time?
11 A. I seem to recall that there had been some discussions
12 involving the Australian Estate Manager in the early days
13 of discussions about the Audit Office's requirements and
14 the like, and I can't be certain about this, but I think
15 there was a conclusion reached that the Commonwealth
16 wasn't interested in owning a building in that location in
17 the long term.
18

19 Q. Apart from this idea at that time which was that
20 there would be a York Park complex?
21 A. Apart from the York Park proposal.
22

23 Q. Which was further away in time, at least as people
24 understood it then --
25 A. Yes.
26

27 Q. -- from this one?
28 A. Yes.
29

30 Q. But, of course, accepting what you say, there was no
31 real need for the Audit Office to move out of Medibank
32 House to this Barton building either, if the terms of the
33 transaction were so uncommercial as to make it an
34 improvident transaction for the Commonwealth; would you
35 not accept that?
36 A. Yes.
37

38 Q. I think, Mr Ferrari, you dealt with your conversation
39 with Mr McKeon in your evidence to the earlier inquiry; do
40 you recall that?
41 A. Vaguely.
42

43 Q. Do you have in your bundle your earlier statement
44 which deals with that? I think it is a statutory
45 declaration.
46 A. Is that exhibit 4 - CH94.001.0120? Oh, sorry, 0119
47 and 0120?

1
2 Q. Yes. That's your statement that deals with how you
3 found out about this \$50,000 matter; is that right?
4 A. That was my statement that I made in 1994 about it,
5 yes.
6
7 Q. Have you had time to reflect on that as to whether or
8 not it is completely accurate in terms of how you found
9 out about it?
10 A. Oh, I have certainly had time to reflect on it in
11 recent weeks. I must say that my best recollection is
12 that I did have discussions with a number of people,
13 including Noelene Garner, Robert Ireland, Richard McKeon,
14 but I can't say that I have got a clear recollection at
15 this point in time of exactly the order in which those
16 discussions took place or precise nature of those
17 discussions.
18
19 Q. The one thing that you are quite firm about, though,
20 is this, is it not: the idea that the APG should be paid
21 a fee by an owner/developer, either being the ALP or its
22 company or Lend Lease, for anything to do with this
23 transaction, was rejected by you?
24 A. Yes, I'm quite sure of that.
25
26 Q. And rejected out of hand?
27 A. As a fee to APG, yes.
28
29 Q. Yes. You didn't think about it too much; it became,
30 once it was revealed to you, something that was
31 unacceptable to you?
32 A. That's right.
33
34 Q. Why was that?
35 A. Well, because I think by its very nature, such a
36 payment might imply that APG was attempting to work for
37 two masters, which was not the case.
38
39 Q. Indeed, two masters which had opposite interests in
40 the transaction?
41 A. In this particular transaction; that's right.
42
43 Q. And that's why you rejected it out of hand when it
44 was put to you?
45 A. Yes.
46
47 Q. Did you initiate a search of the files to see if

1 there was any note made of this suggestion that there was
2 to be \$50,000 paid to the APG?
3 A. I think that was something that I discussed with
4 Noelene Garner, because she seemed to know a good bit more
5 about the history of this payment than what I did -
6 indeed, I know nothing up to this point in time - and I
7 seem to recall that she may have told me that when she
8 first became involved in the project she had heard about
9 this, and took some specific care to see whether there was
10 anything on the files in relation to it.
11
12 Q. Had she found anything when she had looked?
13 A. No, my recollection is that she conveyed to me that
14 she hadn't.
15
16 Q. Did the fact that there was nothing on the file at
17 the APG, as best as you could tell, on this matter,
18 concern you?
19 A. Yes, it did.
20
21 Q. Why was that?
22 A. Well, simply because - well, it did to a limited
23 degree, simply because given the potential for such a
24 payment to be misread in terms of what the APG was and who
25 it was representing, I felt that it probably should have
26 been identified if a formal offer had been made. So, from
27 that point of view I was a bit concerned. I think
28 subsequently, though, when I heard that the offer was only
29 ever made informally, I was more relaxed about that, given
30 that what I was advised was the offer was made informally
31 and rejected straightaway, effectively - sorry, I'm not
32 quite sure whether it was rejected straightaway or whether
33 there might have been some period of consideration given
34 to it, but rejected nevertheless.
35
36 Q. Did you take up this suggestion that an offer had
37 been made and accepted with Mr Collins when you found out
38 about it?
39 A. No, I don't think so. No, I think by that stage - I
40 don't think Mr Collins was still in Canberra and I don't
41 think I - I don't think I have spoken ever to Mr Collins
42 about it.
43
44 Q. Is that because you felt you had dealt with it and it
45 didn't need any further investigation from you as to what
46 had or might have occurred earlier?
47 A. Yes.

1
2 Q. You did, of course, as we know, tell Mr Meert about
3 it?
4 A. I did.
5
6 Q. You regarded that as a proper thing to do?
7 A. Yes.
8
9 Q. You did so immediately you had heard about it, didn't
10 you.
11 A. I think so, yes. It might have been the next day -
12 look, I don't remember the precise time, but it was
13 certainly --
14
15 Q. Very soon after?
16 A. Very soon after.
17
18 Q. Within a day or two at the most?
19 A. Yes. Yes.
20
21 Q. Subsequent to meeting with Mr Jeffress and Mr Holden
22 on 28 February, did you create any document that led to
23 the execution of the Agreement for Lease?
24 A. Subsequent to that - did I --
25
26 Q. Create any document?
27 A. I don't think so.
28
29 Q. I know I took you to the other day, I believe, the
30 minute --
31 A. Yes.
32
33 Q. -- that went I think to the Minister; is that right?
34 A. No, it would have gone to Mr Holden as delegate of
35 the Minister.
36
37 Q. When you signed the minute that I took you to the
38 other day, which was the minute to Mr Holden, had you
39 discovered that there had also been a minute sent earlier
40 to the relevant Minister in respect of the matter?
41 A. I have no recollection of that. I may have.
42
43 Q. Could there be brought up on the screen
44 CH94.015.0012. I would ask you to look at that, together
45 with the succeeding pages, 0013 and 0014. Would you just
46 look at those and I will ask you a question about it when
47 you have had a look.

1 A. Sorry, do you want me to read this in detail?
2
3 Q. In sufficient detail for me to ask you and get an
4 answer to the question of whether or not you saw it when
5 you went through the file and, in particular, when you
6 signed off on the minute that went to Mr Holden. What I
7 mean by that is not at the moment you signed off on that
8 minute, but at some time prior to or at the time you
9 signed off on that minute. So you read it in whatever
10 detail you need to answer that question.
11 A. Yes, I have read it. Now, sorry, what was the
12 question.
13
14 Q. The question is this: did you see that minute - that
15 is, the one that went to the Minister - at any stage in
16 February 1992, or at any stage before you signed off on
17 the minute that went to Mr Holden?
18 A. I don't recall, and it might have depended on whether
19 or not the brief had come back from the Minister's office
20 and whether it was on the file at that point in time.
21
22 Q. Was there a need, under the procedures, whether legal
23 or practical or both, as you understood them at the time,
24 for the Minister to receive a minute such as this one in
25 respect of this transaction?
26 A. Well, I think that would have been a matter of
27 judgment for the state manager. I don't think there was
28 an absolute need. I mean, the state manager had the
29 Minister's delegation to exercise if he saw fit, and in
30 exercising that delegation there wasn't a requirement
31 necessarily to go to the Minister.
32
33 Q. So this minute may have been prepared, for example,
34 in order to brief the Minister in the context of the
35 publicity that was occurring at around about 16 January
36 1992?
37 A. Well, reading the front page and the issue, and the
38 recommendation, yes, I think I would draw that conclusion.
39
40 Q. The critical minute in terms of executing the
41 agreement is the one I took you to the other day, which
42 was the one that has your signature on it and the one that
43 went to Mr Holden?
44 A. That was the critical document in terms of seeking
45 Lands Acquisition Act authorisation, which was a step
46 clearly required before the documentation could be
47 executed.

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Q. Would you look, please, at paragraphs 34 and 35 of your statement for this inquiry, Mr Ferrari.

A. Yes.

Q. The document that you have referred to there is CH94.002.0257 to 0259. I would ask that that be brought up on to the screen. I think what you have said is that you were asked to elaborate on questions 1, 2 and 5; is that right?

A. Right, yes.

Q. First of all, why don't you read it and then we will come back to the document.

A. Yes.

Q. Could we go back to the earlier page, which is page 257. The answer to question 1, "Is the lease a standard Commonwealth property lease?", would have been "no", would it not, if it was being required to be answered frankly?

A. Well, "no" would not have conveyed the full import that I was trying to convey, which is that the standard Commonwealth property lease is made up of a whole series of discrete clauses, but wasn't in a form that was appropriate to use for this particular transaction, because it didn't reflect the way this transaction was structured. So, although it wasn't used, we went through quite an extensive process using AGS legal advice to incorporate into the documentation that was used any elements out of the standard Commonwealth lease that we believed were required.

Q. Was that something you knew yourself for a fact because you had been involved in that process, or was that something you believed had happened with the assistance of the AGS?

A. No, that was something I had been involved in directly myself.

Q. Then, question 2:

Is the lease fair and equitable to the Commonwealth and a commercially attractive one for the ANAO?

You answered that one "yes", and then you added to it; is

1 that right?

2 A. Yes.

3

4 Q. Do you still think that?

5 A. Well, clearly the market hasn't gone the way which
6 favoured what was agreed at that point in time, so it
7 hasn't turned out to be in favour of the Commonwealth, but
8 at that point in time I think it was a valid answer, based
9 on the valuation advice that we had.

10

11 Q. You have gone on and said:

12

13 *The key parameters of the agreement (rent*
14 *level and annual escalators) were agreed*
15 *based on long-term annual growths measured*
16 *over 10-15 years to 1991 and market*
17 *information on equivalent rents.*

18

19 Was that something that both Mr Collins and Mr Jeffress
20 told you?

21 A. I think so.

22

23 Q. Then you go on:

24

25 *In the view of both Australian Valuation*
26 *Office and Australian Property Group, the*
27 *agreement will prove to be good value for*
28 *ANA0 over the term of the lease. It is to*
29 *be expected that at some time during the*
30 *term the agreement will favour the lessor*
31 *and at other times will favour ANA0.*

32

33 Do you see that?

34 A. Yes.

35

36 Q. Would you not agree that to say what you said in the
37 first sentence of that second paragraph was pure and utter
38 speculation?

39 A. In the first paragraph?

40

41 Q. The second paragraph.

42 A. In the second paragraph?

43

44 Q. The first sentence.

45 A. It was a view based on the valuation advice - the
46 formal professional valuation advice that had been
47 obtained.

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Q. Well, it is more than that, you have said the AVO and the APG - that in the view of both those organisations - "the agreement will prove to be"; do you not accept that?
A. Yes.

Q. Would you not accept that you could not have had a sound basis at that time for making that statement?
A. No, I don't agree with that. I think my belief was that the basis of the valuation advice was that it was not unreasonable to in fact form the view.

Q. What I am getting at is this: there was no way anyone could know - valuer, real estate agent, or anyone else - whether or not escalating this rent at 9 per cent compound over a period as long as 15 years would - and I underline that word, because that's the one you have used - prove to be good value?
A. In absolute terms, but the assumptions that were made by the valuer, and the striking of the escalator which was at a level considerably below what the historic trend had been over a similar period of time, was the basis of forming that view.

Q. Then question 3 is:
Is the 15 year term of the lease an exception or a norm? To this end, what is the average length ...

And so on. Then you say:
The typical term for a precommitment lease is 10-12 years with an option for a further ten year or two five year extensions.

Then you say:
The longer term suited ANAO's requirements and enabled the lease conditions to include a total refurbishment of the premises after year ten. The lease provides that the details of the refurbishment have to be agreed with ANAO and will be carried out at no extra cost to the tenant.

Now, you did not say in that answer that the 15 years was

1 something that the landlord had wanted in order to make
2 the proposal attractive to a financier, did you?
3 A. No.
4
5 Q. Was that something you knew at the time that answer
6 was drafted?
7 A. I suspect I knew that.
8
9 Q. Why didn't you include that fact in the answer to
10 that question?
11 A. I can't answer that question. I don't know.
12
13 Q. Aren't you --
14 A. Other than it didn't appear to me to be an answer
15 warranted from the question that had been asked.
16
17 Q. Well, aren't you seeking to convey in the answer that
18 you did put forward that the 15-year term was really and
19 exclusively and solely for the benefit of the Commonwealth
20 and the ANAO?
21 A. No, I am not sure that I am conveying that impression
22 at all. I think what I am attempting to convey is what
23 the Commonwealth and the ANAO's benefits were as perceived
24 at that point in time, but that's not necessarily any
25 absolute statement about what the other side might or
26 might not find in the transaction.
27
28 Q. And then to the next question, question 4, you gave
29 an answer which is on page 257 - I am not sure if it goes
30 over the page. Could we have a look at page 258? Again,
31 may I suggest to you that you did not mention what you had
32 come to be aware of at that time, which is that the rate
33 of growth of rents was looking like it might be slowing
34 down as at February 1992?
35 A. That wasn't what I was aware of at that point in
36 time, though.
37
38 Q. Well --
39 A. I mean, I - at the time that this was drafted, which
40 was some time into 1992, at that stage I had the benefit
41 of the valuation advice as at February 1992, which had
42 confirmed that the 10.5 per cent added on to the January
43 1991 rent, at least in February 1992, was still within
44 market.
45
46 Q. Did you go and seek further valuation advice from the
47 AV0 before you answered these questions in September 1992?

1 A. I'm not sure. I may have, but I'm not sure. But
2 that's not what I'm saying.

3
4 Q. Well, what are you saying?

5 A. I'm saying that - you were indicating to me that I
6 had formed some view about market rents falling by this
7 point in time.

8
9 Q. I didn't say falling --

10 A. What I'm saying --

11
12 Q. I said rate of growth slowing.

13 A. Rate of growth slowing. What I'm saying to you is
14 that my view of what was happening in the marketplace was
15 based on the advice provided to us by the valuation office
16 in February 1992. Whilst I might have made observations
17 of my own about what might have been happening with the
18 rental market, I wasn't qualified as a valuer and was
19 obliged to rely on the formal valuation advice that we
20 received.

21
22 Q. When you said, as you did, in the last paragraph in
23 answer to question 4:

24
25 *The rent level struck on Centenary House*
26 *compares favourably with other rents in*
27 *Barton...*

28
29 Was that a reference to the specific rents struck as at
30 1 January 1991?

31 A. I don't think so. I think that is a combination of
32 the rent level agreed as at 1991 and escalated by
33 10.5 per cent up to the point in time that I was writing
34 the note.

35
36 Q. Well, did you have information as to what rents were
37 being asked for in comparable buildings in Barton as at
38 February 1992 when you came to write this answer?

39 A. I seem to recall I did have some other information,
40 but I don't remember as I sit here exactly what was in
41 front of me as I formulated those answers.

42
43 Q. And question 5 is in the terms that raises the
44 escalator, or one of the escalators. You have answered:

45
46 *The normal practice is either rent to*
47 *market on completion or agreed rent with*

1 escalator to occupation. The advantage of
2 the latter option taken with Centenary
3 House is that the rental costs are known
4 from the outset.

5 The 10.5% escalator was agreed based
6 on market evidence at the time which showed
7 that short-term rent growth in Barton had
8 been between 12.5% and 13.75% in the two
9 years to 1991 and in 1991 the rate had
10 dropped to 10.5% to 11%.

11
12 Were there leases of which you were aware at that time
13 that had fixed the starting rent by reference to some date
14 which was a long time before the date when the lease
15 commenced?

16 A. I don't recall. It may have been an approach that
17 was used on the Tax Office buildings, but I can't say I
18 have got a recollection of that now.

19
20 Q. Would you not accept at the time that the normal
21 practice was to fix the market rent as at the date of
22 completion of a building, ie, the commencement of the
23 lease itself, in circumstances where a lease was to be
24 taken of a new building such as the present case?

25 A. I don't think I'm in a position now to agree with
26 that or disagree.

27
28 Q. Then the next question asks about the escalator. You
29 have said this:

30
31 *During the last 2-3 years the Commonwealth*
32 *has found that precommitment developments*
33 *have required agreement to an initial rent*
34 *and annual escalators over the term of the*
35 *lease. This applies in markets around*
36 *Australia.*

37 *The rent set in the agreement (9%) was*
38 *agreed based on evidence provided by the*
39 *[AV0] That over a fifteen year period the*
40 *growth rates in Barton were between 9.08%*
41 *and 10.51%.*

42
43 Do you see that? You are suggesting that this fixed
44 escalator was something that the Commonwealth ordinarily
45 had agreed to in the past, aren't you?

46 A. That answer seems to convey that impression. I
47 suspect if that's the case, it may well have been

1 reflecting the transactions that were being done to the
2 Tax buildings.

3

4 Q. You talk about those. Can you tell us which Tax
5 buildings they are?

6 A. Not off the top of my head, but I do recall that
7 during 1991 and then extending, I think, for a couple of
8 years, the Tax Office had embarked on a major expansion of
9 setting up regional offices in a number of occasions in
10 locations around the country - I think of the order of 10
11 or 12 sizeable office buildings, all of which were done
12 under precommitment lease arrangements.

13

14 Q. But with fixed annual escalators over a long period
15 of time? Is that what you are saying, because we are
16 going to check this. Is that what you are saying?

17 A. I don't know about over a long period of time. I
18 think - I'm not - look, I couldn't say now what the
19 precise arrangements were with those buildings. But - I
20 am looking for some rationale to what I have placed - what
21 I have written in that answer there, and that was - the
22 Tax buildings were certainly something that I had had some
23 involvement in, and so may have been conveying my
24 experience in that into this answer.

25

26 Q. Or you may have just got this answer wrong; would you
27 not accept that?

28 A. Well, no, I don't accept that, because I think to do
29 that would have been simply misleading, and I don't
30 believe that I was attempting to mislead anyone in
31 providing the answers.

32

33 Q. Did you think that you might be able to justify that
34 statement by reference to the Tuggeranong project, for
35 example?

36 A. I think that was something that had occurred to me,
37 yes. But not in a particularly specific way. It was also
38 another transaction that I was aware of.

39

40 Q. What about the AUSLIG transaction; were you aware of
41 that when you gave these answers?

42 A. Yes, I was aware of that.

43

44 Q. Is that one you had in mind when you gave these
45 answers, do you think?

46 A. It could have been, although my statement there
47 about, "This applies in markets around Australia"

1 obviously conveys an impression that - of something other
2 than in Canberra.

3
4 Q. Well, can you point to any Agreement for Lease or
5 lease that you were aware of at this time that had been
6 negotiated in the ACT which had fixed annual escalators
7 over a long term, other than Tuggeranong and AUSLIG?

8 A. Not that I can recall today.

9
10 Q. Then could we move to the next page, 259. In
11 question 9 you have given an answer as to the value of the
12 incentives; do you see that?

13 A. Oh, yes.

14
15 Q. Did you do that work that enabled you to express that
16 answer, or did you ask for that work to be done by someone
17 else, or was it volunteered by, for example, Mr Jeffress
18 to you at some stage?

19 A. No, I think I did that calculation myself.

20
21 Q. Did you appreciate that Mr Meert was looking for
22 information to provide to the Parliament when these
23 questions were answered by you?

24 A. I don't have a clear recollection, but I think he was
25 trying to put some background information together prior
26 to attending the Senate Estimates hearing.

27
28 Q. Do you have a recollection that in various months of
29 1992, commencing in about late June or July,
30 Senator Bishop, who was a coalition Senator, was driving
31 questions in the Senate about this transaction?

32 A. I have a recollection, yes.

33
34 Q. I'm not sure whether her interest in the matter
35 continued beyond that, but she was certainly active, if I
36 can call it that, in Estimates Committee hearings in 1992,
37 was she not, to your recollection?

38 A. To my recollection, yes.

39
40 Q. Did you participate in dealing with questions that
41 were coming from that process, on behalf of the APG?

42 A. I can't remember the precise timing. I had a feeling
43 that these answers to these questions were provided prior
44 to any Senate Estimates hearing. Whether or not we then
45 received subsequent questions that arose during the course
46 of any Estimates hearing, I can't say I recall at this
47 point in time.

1
2 Q. Would you look at a document which is CH94.004.0334
3 through to 343, which is in your bundle, if you have a
4 hard copy, tab 11.
5 A. Sorry, I don't have any tabbed bundle.
6
7 Q. I will ask you to look at this document on the
8 screen. Would you have a look at the first page, which is
9 0333 and then would you follow it through for us. I would
10 just like to you read it.
11 A. I see what the document is. I think I do have a hard
12 copy of that document.
13
14 Q. Did you prepare that document?
15 A. I did.
16
17 Q. Did you prepare that in order for it to be given to
18 the Senate?
19 A. No.
20
21 Q. What was the purpose of your preparing that document?
22 A. I prepared that at the request of the Audit Office.
23
24 Q. What did you understand they were going to do with
25 it, once you gave it to them?
26 A. I was ultimately asked to present it to the
27 staff - the senior staff of the Audit Office.
28
29 Q. Right. So, as you understood it, and as it turned
30 out, it was for informing the Audit Office?
31 A. Yes.
32
33 Q. It was meant to be a detailed paper which served that
34 purpose?
35 A. Yes.
36
37 Q. You have had a chance, I assume, to look at this in
38 recent times, have you?
39 A. Look, I did look at it again in recent weeks but I
40 can't say that I focused on it in any great detail.
41
42 Q. I don't want to go through the whole thing with you.
43 Look at page CH94.004.0334, which is page 2 of the
44 document. Do you see under the heading "Agreement to the
45 Size of the Escalators" you have written:
46
47 *Agreement to a particular escalator is not*

1 *an easy task because it must contain an*
2 *element of speculation.*

3
4 Do you see that?

5 A. Yes.

6
7 Q. That is obviously right, is it not?

8 A. Yes.

9
10 Q. It is more speculative to agree on a fixed escalator
11 for a longer period than for a shorter, is it not?

12 A. In one sense, but in another sense, no. If you are
13 looking at use in a longer period then there is more
14 likelihood that short-term fluctuations of a market, like
15 a property market, will be averaged out over time.

16
17 Q. But you are assuming that the property market going
18 forward will be completely stable, aren't you, when you
19 say that?

20 A. Not completely stable, no. Not at all.

21
22 Q. Relatively stable?

23 A. That would equate over a period of time to a stable
24 annual indicator, but with fluctuations in the short term,
25 perhaps over that and under that.

26
27 Q. You go on:

28
29 *Historic performance of property markets is*
30 *the best indicator to use. Property*
31 *markets do fluctuate significantly year to*
32 *year but over the long term show reasonably*
33 *consistent growth.*

34
35 Do you see that?

36 A. Yes.

37
38 Q. Were you qualified to say that?

39 A. I think I was repeating information that I had been
40 provided by others.

41
42 Q. You wouldn't regard yourself as qualified to express
43 an opinion such as that, really, would you?

44 A. No.

45
46 Q. For a start --

47 A. And bear in mind that this wasn't going to be used

1 for any decision-making purpose; this was an attempt to
2 provide to a group of people in an organisation an
3 explanation as to what had happened. So I didn't consider
4 that I was actually giving formal professional advice on
5 which someone was going to act.

6

7 Q. No, but you were trying to satisfy them that the
8 transaction was okay, weren't you?

9 A. At a personal level, yes.

10

11 MR FOSTER: Is that a convenient time?

12

13 THE COMMISSIONER: Yes, certainly. We will adjourn for
14 15 minutes.

15

16 **SHORT ADJOURNMENT**

17

18 MR FOSTER: Q. Did you get any help from anyone in the
19 APG to write this paper that I was asking you about before
20 morning tea?

21 A. I suspect so.

22

23 Q. So some of the thoughts in here may be other people's
24 thoughts that you have simply repeated; would that be
25 right?

26 A. Oh, certainly, yes.

27

28 Q. The third paragraph under this heading I was asking
29 you about commencing with:

30

31 *Further, there is little correlation*
32 *between CPI, property values and rents.*

33

34 Do you see that?

35 A. Yes.

36

37 Q.

38 *For example, the property market in Tokyo*
39 *has performed very well, even though Japan*
40 *has had low inflation for some years.*

41

42 Did someone tell you that?

43 A. I may have been told that or that may have been an
44 observation that I had made just in the context of my own
45 experience.

46

47 Q. Figure 1 shows rental growth in City and Barton over

1 the last 10 years compared with growth all groups CPI over
2 the same period. I am not sure I can show you figure 1 as
3 part of this document?
4 A. I think I have a copy of it here.
5
6 Q. Would you be able to just hand that to the court
7 officer so that I can have a look at it?
8
9 MR SACKAR: It is tab 8, I think.
10
11 MR FOSTER: Thank you.
12
13 THE COMMISSIONER: Do you want it up on the screen?
14
15 MR FOSTER: Yes. It is CH94.002.0203.
16
17 Q. Thank you, Mr Ferrari. I hand that document back to
18 you. CH94.002.0203 is figure 1 that is referred to in
19 that paragraph I just drew your attention to, isn't it?
20 A. 0203?
21
22 Q. In other words, the graph --
23 A. Yes.
24
25 Q. -- figure 1 --
26 A. Yes.
27
28 Q. -- is what is on the screen now?
29 A. Yes.
30
31 Q. For the transcript, that is CH94.002.0203. Who
32 prepared that document?
33 A. I don't recall.
34
35 Q. Did you?
36 A. It is possible. Or it might have been from something
37 the valuers provided. Look, I can't say. I can't say.
38
39 Q. It has "Australian Property Group September '92" on
40 the bottom, doesn't it?
41 A. Yes, it does.
42
43 Q. That tends to suggest it was prepared in September
44 1992 by someone in the APG, doesn't it?
45 A. Yes, it does - compiled at least, yes.
46
47 Q. Are you able to assist us at all with what buildings

1 were taken into account in the columns "City rents" and
2 "Barton rents" that form part of this figure?
3 A. Not at the moment. Not today, no. I mean, I suspect
4 I knew at the time. There are a series of other graphs
5 behind. I wonder if it is a compilation of information
6 from there. I don't know. I really don't know.
7
8 Q. That's one view. By the way, these rents, city rents
9 and Barton rents in figure 1, are they gross rents?
10 A. If they are - yes, if they are rents up to 1992,
11 which they appear to be, my recollection is that the
12 typical rent arrangement in the ACT had been gross rents,
13 so, yes, it probably would have been gross rent.
14
15 Q. Would you agree that, just accepting the figures in
16 the columns for city rents and Barton rents for the
17 moment, the column "City % PA growth" first of all
18 indicates that between 1983 and 1992, up to the point at
19 which this document was prepared, there had been growth in
20 the rents that were shown in that first column?
21 A. Yes.
22
23 Q. And that there had been growth in each of the years
24 dealt with?
25 A. Yes.
26
27 Q. But that the rate of growth varied from year to year?
28 A. Yes.
29
30 Q. And, indeed, in some cases, very significantly?
31 A. Yes. Sorry, there may have been a reason for that,
32 but go on.
33
34 Q. I beg your pardon?
35 A. There may have been a reason why variation was
36 showing in the statistics.
37
38 Q. Yes, and what would that be?
39 A. Based on - for example, the information that's there,
40 I seem to recall, was based on the outcome of rent reviews
41 and new leases struck over time. Canberra is not all that
42 big a place, and it is possible that - for example, if you
43 have a look at the tabulation there, I guess it is
44 possible that say in 1986 and in 1988 there might not have
45 been much in the way of activity indicating, you know,
46 rent reviews and the like, but, in the other years, there
47 might have been.

1
2 Q. Or the other way around; would you agree?
3 A. Sorry.
4
5 Q. Or the other way around?
6 A. What's that?
7
8 Q. That where we have some of these enormous increases,
9 that may reflect the increase in one building on one
10 lease?
11 A. Could be, yes.
12
13 Q. Would you agree with that?
14 A. Yes, I guess that is true, yes, or the other way
15 around, indeed. The only point I am trying to make is
16 that although there appears to be a massive variation year
17 to year, that's not necessarily how one would interpret
18 the market as going in a long term.
19
20 Q. But these figures, to your recollection, at the time,
21 for the city rents, reflect the activity in very, very few
22 buildings - perhaps one or two; would you not agree?
23 A. No, it would have been more than that, I think. I
24 mean, you would have to ask the valuers.
25
26 Q. You can't help us?
27 A. I suspect it is valuation advice or it is advice
28 coming out of APG database, so I couldn't tell you off the
29 top of my head how many buildings there were.
30
31 Q. No.
32 A. I'm just saying that the market in Canberra is a lot
33 smaller than, say, the market in the CBD in Sydney where,
34 you know, there are many, many buildings and so you would
35 expect, over time, to have a fairly good reflection of
36 exactly what is happening at any point in time by the
37 statistics.
38
39 Q. Exactly. And that if the contributors to the
40 compilation such as this one, figure 1, were only one or
41 two buildings, for example, that that would hardly be a
42 reflection of any market, would it, to your understanding?
43 A. Well, it is the best assessment that could have been
44 made at the time, but I think the point is that we are
45 looking at over the long term rather than over the short
46 term.
47

1 Q. You go on in your document, page CH94.004.0334, which
2 is page 2 of your paper:

3
4 *The Australian Valuation Office provided*
5 *advice in 1991 about historic rent growth*
6 *in Canberra and in particular in Barton.*
7 *The complete valuation is attached but the*
8 *advice provided from research on a number*
9 *of buildings in City and Barton was that*
10 *over a 15 year period, growth rates in*
11 *Barton were between 9.08% and 10.51%, and*
12 *for City the rates were from 10.18% to*
13 *10.66%.*

14
15 Do you see that?

16 A. Yes.

17
18 Q. Did you know what it was that the valuer who had
19 written that report had actually done in order to justify
20 the position that he took in the report?

21 A. I'm not sure that I knew that in totality. I think I
22 would have had a pretty good understanding of what he did,
23 but I can't say I remember that clearly at this point in
24 time.

25
26 Q. Did you have the impression that he had done a
27 significant amount of research on his own in order to come
28 up with view of his own in relation to what views he
29 expressed in this report?

30 A. I'm not sure that I thought about that. What I did
31 think was that I knew that he was a professional valuer of
32 some experience and so I think I presumed that he would
33 have done whatever he needed to do to arrive at the
34 conclusions he did.

35
36 Q. That was a presumption or assumption you made without
37 being apprised of the detail of what he actually did; is
38 that right?

39 A. I think so.

40
41 Q. Over the page, CH94.004.0335, you say:

42
43 *There is not always good correlation*
44 *between rents paid per annum and average*
45 *annual growth of rents over the long term.*

46
47 Do you see that?

1 A. Yes.

2

3 Q.

4 *At times there is (see Figure 2 Bligh House*
5 *and Figure 3 John McEwan House in Barton)*
6 *but at other times there is not (see*
7 *Figure 4 Citibank and Figure 5 Wales*
8 *Centres in City).*

9

10 Can I just take you to figure 2, CH94.002.0204. Is was
11 that something that was prepared for you within the APG?

12 A. It may have been. It was either prepared for me or
13 the information was provided to me and I may have prepared
14 it myself.

15

16 Q. The first column indicates the actual rent, as you
17 understood it, for that particular building between 1978
18 and 1990, does it not?

19 A. Yes.

20

21 Q. The second column shows what it would have been had
22 it started at \$83 per square metre and been escalated at
23 10.5 per cent over that period; is that right?

24 A. That's right.

25

26 Q. And the last one - is that the same exercise, but at
27 9 per cent?

28 A. Yes.

29

30 Q. Is what you are attempting to show by that exercise
31 in respect of this building that in some way, over a
32 period of time, a fixed rate will even out the lows and
33 highs of rent reviews according to market?

34 A. No, I think what I was trying to demonstrate, or
35 display there, was that the 10.51 per cent, if
36 superimposed over the actual rents over that period of
37 time, showed a pretty good fit with one another, and the
38 9 per cent was coming out for a significant period of
39 the - for a significant period of the total time period,
40 at being somewhat less than what had been experienced.

41

42 Q. Right. So is what you were trying to show by this
43 particular figure that in this particular building,
44 between 1978 and 1990 - a 12- or 13-year period - actual
45 rental increases, if looked at or compared with a 9 per
46 cent fixed escalator over the same period, had ended up at
47 a larger figure?

1 A. Actuals had ended up at a larger figure than if a
2 9 per cent had been imposed, yes.
3
4 Q. And you are trying to demonstrate that in that
5 building, if there had been a fixed annual escalator of
6 9 per cent, then the Commonwealth would have been better
7 off?
8 A. Yes.
9
10 Q. Did you know what the terms of the Bligh House lease
11 that you were depicting here were when you did this
12 document or put forward this document?
13 A. No.
14
15 Q. In particular, did you know what the rent review
16 terms were?
17 A. I don't think so. I may have, but I don't think so.
18 I don't know. Look, I can't remember at this point in
19 time. I think I was basing my information on the actual
20 rentals paid, which would have been obtained out of the
21 APG database or from the AVO data, or whatever.
22
23 Q. Well, did you assume for the purposes of this
24 demonstration in this document that the figures in the
25 column "Actual Rental" reflected market rates at the time?
26 A. No, I presumed they reflected what was being paid at
27 the time.
28
29 Q. In this one building?
30 A. In this one building.
31
32 Q. And then John McEwan House; is this a similar
33 exercise?
34 A. I believe so.
35
36 Q. May we take it that somehow you had information as to
37 the actual rentals being paid for that building at that
38 time?
39 A. Yes.
40
41 Q. Did the Commonwealth have any leased space in
42 John McEwan House in 1990 or 1991, to your recollection?
43 A. I have no idea. I suspect it did, because if this
44 information came from APG's database, it would probably
45 only be in there because we were paying rents in that
46 building, but I don't know that for certain.
47

1 Q. I wanted to ask you that, actually. Did the APG
2 database have only transactions which the Commonwealth had
3 entered into in it, at the time - that is, in 1991?
4 A. I think there might have been separate components to
5 the database, but I'm not certain about this. Certainly
6 it had any rents the Commonwealth was paying in it.
7 Whether it had another element that recorded data in other
8 buildings that we weren't occupying, I couldn't say for
9 sure. I don't know that that would have been a big factor
10 anyway, because the Commonwealth would probably have been
11 occupying most of the sizeable areas of space available -
12 although, by 1992 the ACT government would have as well, I
13 guess, so, yes, there would have been some buildings that
14 we didn't at that stage.
15
16 Q. And in Civic there would have been a greater
17 proportion of commercial tenants than perhaps
18 Commonwealth; would you agree?
19 A. Well, yes, but I suspect it was still a very small
20 proportion of the space.
21
22 Q. Then you have got an exercise with the Citibank
23 building. Is that a similar one to the one that you did
24 on Bligh House?
25 A. Yes.
26
27 Q. The Wales Centre?
28 A. Yes.
29
30 Q. Then figure 6 - I will come back to it in a minute,
31 if I may. Can I just go back to your document,
32 CH94.004.0335. You say:
33
34 *For that reason and also because annual*
35 *increases were proposed rather than the*
36 *more normal adjustment every two years, the*
37 *Commonwealth argued for an annual figure*
38 *below the long-term figure.*
39
40 A. Sorry, could I ask what page you are on at the
41 moment?
42
43 Q. Yes, certainly. Page 3, second paragraph from the
44 top, and it is CH94.004.0335.
45 A. Yes.
46
47 Q. I just want to understand what it is you are saying

1 there. If you look at figure 6, what buildings have gone
2 into the mix as being the historical rentals for Barton
3 which you took into account? Is it just Bligh House and
4 John McEwan House?
5 A. Oh, look, I honestly can't say at this point in time.
6 I don't recall. I mean, I recall that there was a set of
7 data. Quite on what it was based I have no recollection.
8
9 Q. Figure 6 is described, I think:
10
11 *Historical rentals for Barton as against 9%*
12 *increase.*
13
14 Do you see that?
15 A. Yes.
16
17 Q. I am just trying to understand where the figures came
18 from. It starts at 1982, rather than in any date in the
19 1970s; do you see that?
20 A. Yes.
21
22 Q. It is 10 years or 11 years, perhaps, I don't know -
23 1982 to 1992?
24 A. Yes.
25
26 Q. If you look at the '82 rent for Bligh House,
27 apparently, according to this document that is figure 2,
28 in Bligh House the actual rent was \$130 per square metre
29 and in John McEwan House it was \$90; do you see that?
30 A. Yes, I see that.
31
32 Q. Is what happened that somebody added 90 to 130 and
33 divided it by two for the purposes of figure 6 to
34 determine what the so-called actual rental for '82 was?
35 A. It looks like that has been done. I suspect somehow
36 an average rate per square metre was determined for each
37 of those years for Barton. Just exactly how it was done I
38 don't know, but I certainly agree with you that it looks
39 like those two figures were averaged.
40
41 Q. Certainly for '82 it does?
42 A. Yes.
43
44 Q. You are unable to recall if that is how it was done
45 for the others?
46 A. No, I'm not --
47

1 Q. Or, indeed, if that's how it was done at all?
2 A. Yes, that's right. I'm unable to recall. It
3 certainly looks like that's the way it was done.
4
5 Q. Can you assist us with what buildings went into the
6 mix for the purposes of figure 6?
7 A. No, I can't - sorry, not at the moment. I may well
8 have known at the time.
9
10 Q. No, no, I appreciate that. I appreciate the
11 difficulties. It, nonetheless, is meant to depict, is it
12 not, the comparison between some actual average annual
13 growth by reference to the figures in the first column,
14 versus what it would be had it been escalated at 9 per
15 cent per annum compound?
16 A. That's right.
17
18 Q. And the purpose of this document, once again, is to
19 demonstrate that, having regard to the past, 9 per cent
20 was a good fixed escalator for the Centenary House
21 transaction?
22 A. That's what the valuers seem to be saying, and this
23 was the basis on which, I think, the valuer - at least in
24 part - was basing his opinion.
25
26 Q. But isn't that what you are saying to the Audit
27 Office in these passages I have been taking you through?
28 A. Yes, as an explanation as to how I understood it to
29 be at the time this document was prepared in September
30 1992.
31
32 Q. Would you accept that the quality or worth of what
33 you were saying to the Audit Office depended on whether or
34 not this material contained in these figures 1 to 6 could
35 fairly be used in the way that they were being used by you
36 in this paper?
37 A. Sorry, could you repeat that question again?
38
39 Q. Yes. Would you accept that the quality or worth of
40 what you were saying to the Audit Office in this paper
41 depended upon the worth of the material contained in
42 figures 1 to 6?
43 A. I don't know that that's right in an absolute sense.
44 I think this was attempting to be more descriptive than an
45 actual formal justification of a point of view. I think
46 it was trying to convey some sort of basic impression
47 about some of these factors.

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Q. But isn't what you were doing, firstly, attempting to justify the 9 per cent fixed escalator in this paper?

A. No, I don't think I'm attempting to justify it; I'm attempting to describe - to provide to the staff of the Audit Office - the staff of the Audit Office; not the decision makers of the Audit Office, but the general staff - an understanding of the sorts of factors that were taken into account that led to the details of this transaction. It wasn't in any way, as far as I understood it, an attempt to provide a formal justification. If that's what had been required, I would have referred the questions and sought specific advice from the Audit Office. That wasn't what was being asked for. So there wasn't a need for the Audit Office to provide this specific advice, because it was of its more general nature.

Q. But this is a time when the Senate Estimates Committee was all over this transaction, wasn't it?

A. I suspect so, yes, but by that stage the agreement had been entered into some months previously, so it wasn't as if it was in any way something which was being used in a decision-making sense.

Q. No, but what I'm suggesting is that what you were doing in the paper was attempting to justify the transaction by, insofar as the escalator year by year was concerned, putting forward a set of propositions which suggested that it was, based on historical facts, a reasonable figure to have arrived at?

A. I don't think "justifies" is the term that I would use. As I said a minute ago, I think what I was trying to do was to provide some sort of descriptive presentation of the sorts of concepts that were being used.

Q. And what I am suggesting to you is that the material in figures 1 to 6 was put forward with a particular object in view - that is to say, to suggest that historical trends, at least, had indicated 9 per cent was below what had actually occurred in the 10 to 15 years prior to 1992?

A. Yes, I think the graphs do illustrate that.

Q. Well, they were put forward with the intention of illustrating that?

A. Yes.

1 Q. What I want to suggest to you is that the worth of
2 the picture painted by those graphs depends very much on
3 the material used to prepare them and who it was who
4 prepared them, in terms of what expertise and judgment
5 they brought to bear to the issue?
6 A. I think that's true, but I would also add, then, and
7 the purpose for which the presentation might or might not
8 be used. As I said earlier, this presentation was not, as
9 I saw it, providing professional advice to the Audit
10 Office. It was providing them with a general presentation
11 of some of the concepts that had been used that led to the
12 transaction being the way it was.
13
14 Q. Well, you would agree with one thing, wouldn't you,
15 that the CPI increase from 1984 through to 1992 had been
16 at a level greater than 9 per cent in only one year - that
17 is, 1987 - according to figure 1?
18 A. Yes.
19
20 Q. And you would agree also that CPI increase provisions
21 were common in commercial leases?
22 A. Not that I was aware of, no.
23
24 Q. Really?
25 A. I certainly wasn't aware of that. In fact, the point
26 that I was trying to make, and I'm sure it was information
27 that I had learned about within the real estate market and
28 writings about real estate market, was that there wasn't a
29 correlation between CPI and rents being paid. In fact, I
30 think that was the point that I was making.
31
32 Q. That's not what I was putting to you. Would you not
33 accept that, to your knowledge, it was commonplace in
34 commercial leases for rents to be escalated by reference
35 to CPI?
36 A. My answer to that is no - I don't believe that it
37 was - it wasn't common knowledge to me, indeed, if it was.
38
39 Q. You then go on in your paper, page 3, CH94.004.0335:
40
41 *Incentives negotiated as part of this*
42 *agreement were a \$400,000 contribution to*
43 *fitout and an effective rent free period of*
44 *7 weeks while the tenant's fitout is*
45 *constructed.*
46
47 Is that right?

1 A. Yes.

2

3 Q. You put forward the material under that heading in
4 order to bring into perspective the rental provisions that
5 you had been discussing up until that point in the paper?

6 A. Not so much to bring them into perspective, but to
7 identify these as being additional factors that needed to
8 be considered when looking at the proposal overall.

9

10 Q. And you were suggesting that, in effect, the value of
11 that over time, or over the term of the lease, was 0.5 per
12 cent per annum?

13 A. Yes, I can see that.

14

15 Q. Did you actually do some work to justify that or are
16 you just repeating what Mr Jeffress told you at some
17 earlier occasion?

18 A. I don't know for certain, but I feel that I actually
19 did a calculation myself to come to that conclusion, but I
20 don't recall that in absolute terms.

21

22 Q. You then go on to deal with net versus gross rents?

23 A. Yes.

24

25 Q. You accepted, I think, that commonly up to that point
26 the Commonwealth had habitually dealt with on a gross rent
27 basis?

28 A. Yes.

29

30 Q. And you put forward reasons why that might be varied
31 in this case?

32 A. Yes.

33

34 Q. And then you dealt with the initial escalation
35 factor; do you see that?

36 A. Sorry?

37

38 Q. I am just looking at page 4 of your paper.

39 A. Sorry, yes, the heading - yes, I am with you now.

40

41 Q. And then (d) on page 5, which is CH94.004.0337, you
42 say this - and this is, I remind you, under the heading of
43 "Real Percentage Increase" starting back on page 3:

44

45 *In summary, it is not valid to compare*
46 *directly the agreed annual escalator in*
47 *this agreement to published long term*

1 *growth rates in the ACT. In real terms,*
2 *for a more valid comparison, where general*
3 *price inflation is low and the cost of*
4 *outgoings is also low, the real escalation*
5 *of ANAO's total rent costs may be as low as*
6 *7.5% per annum.*

7
8 Do you see that?

9 A. Yes.

10
11 Q. What you were suggesting by that was, "Look, it is
12 not really 9 per cent when you take into account all the
13 matters I have just discussed"; it is something less?

14 A. Not that it was not really 9 per cent. It was
15 obviously 9 per cent, but when looking to do a comparison
16 with the historical data that had been used, if you wanted
17 to compare apples with apples, then it was those
18 historical levels compared with 7.5 per cent.

19
20 Q. Yes, and you are trying to take into account the
21 change in value of money; is that the point?

22 A. No.

23
24 Q. What is it, then?

25 A. It is reflecting the factors like the rent-free
26 period, the \$400,000 contribution to fitout, the fact that
27 they were net rents not gross rents, and so inflationary
28 costs associated with maintenance of the building,
29 et cetera, weren't a factor in it. Things of that nature.

30
31 Q. Right. The things dealt with under that heading.

32 A. Yes.

33
34 Q. You then go and deal with this Price Waterhouse
35 report, which I don't want to particularly ask you about.
36 Right at the end you say this, on page 10, CH94.004.0342:

37
38 *It seems clear that the terms and*
39 *conditions of the lease between ANAO and*
40 *JCH, negotiated in the latter half of 1991,*
41 *represents good value for ANAO, recognise*
42 *ANA0's operational requirements and*
43 *achieves a prime objective of minimising*
44 *the need for negotiations between the ANAO*
45 *and JCH.*

46 *It must be expected that a long term*
47 *agreement of this nature will, at different*

1 *times, favour either party. Certainly,*
2 *movements in the market since terms were*
3 *agreed have favoured the lessor.*
4

5 And then you go on:
6

7 *However, the rationale behind the figures*
8 *agreed was an expectation that in the long*
9 *term the supply of sizeable quality*
10 *accommodation in Barton would be the*
11 *predominant influence on prices in the area*
12 *as they have been in the past. During the*
13 *last year, that trend was reversed in the*
14 *short term with a number of speculative*
15 *developments coming onto the market without*
16 *tenants. That space has now been absorbed*
17 *and since there are now very few*
18 *development opportunities in the area, the*
19 *expectation has to be a restoration of*
20 *prices consistent with long term growth*
21 *trends.*
22

23 Do you see that?

24 A. Yes.

25
26 Q. Did you compile that section under "Conclusion"
27 yourself?

28 A. I think so.
29

30 Q. It records "During last year", meaning during 1991,
31 that the trend that you refer to there was reversed in the
32 short term, as you say; is that right?

33 A. That's what it says, yes.
34

35 Q. And that was a reflection of what you understood had
36 happened during the course of 1991 when you came to write
37 this document in September 1992?

38 A. Yes. I think perhaps based on information that had
39 become available fairly recently before then in the
40 context of the Price Waterhouse report and subsequent
41 research that I had done subsequently - as a result.
42

43 Q. Yes, but it also fitted with what you thought might
44 have been happening, in February 1992?

45 A. But for which I didn't have the expertise to come to
46 a formal decision in that context, which was more of a
47 decision-making context on which I had to rely on formal

1 valuation advice.

2

3 Q. You see, you have told us, I think, on a number of
4 occasions, that when you were looking at the matter in
5 February 1992, you, in effect, were making sure that there
6 was nothing about the transaction that you saw as
7 unreasonable or should cause you to take any action about
8 it; is that a fair way of putting it?

9 A. No, I think primarily I was looking at it to
10 familiarise myself with what was being proposed in this
11 project for which I had assumed some responsibility. In
12 the course of that, I think you asked me what I would do
13 if I uncovered something which I found to be unacceptable,
14 and I answered that at that time, I think.

15

16 Q. What I am seeking to get from you, though, is this:
17 your perspective on it, in terms of what you were trying
18 to achieve when you were looking at it in February '92,
19 was, "Is there something there that requires me to do
20 something?", rather than, according to your evidence, "Do
21 I have a positive responsibility to vet this transaction?"
22 Is that a fair way of putting your evidence?

23 A. Well, I think I can only just repeat what I said. I
24 think what I was doing was familiarising myself with the
25 detail of this project. I don't think I was looking at it
26 from the perspective of trying to find fault with it or
27 trying to find justification of it. I was looking at it
28 with an open mind, to familiarise myself with something
29 for which I had become responsible in some way.

30

31 Q. Well, we did go through a number of factors and I
32 don't want to go back over them, but eventually you
33 organised a meeting with Mr Jeffress for the purposes we
34 discussed the other day; do you recall?

35 A. Yes.

36

37 Q. What you were looking for from him, so you say, was
38 an answer to the question of whether he had a different
39 view as at February 1992 from the one he had expressed in
40 November 1991?

41 A. Yes.

42

43 Q. Rather than looking for from him, as you testify, a
44 view with a fresh mind to the reasonableness of this
45 transaction as at February 1992?

46 A. That wasn't the basis on which I was looking at it,
47 no.

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Q. In other words, however we express what it was you were doing, it is your evidence that you did not take a proactive or positive position in relation to this transaction in February 1992 in the sense that you did not regard it as your responsibility to vet it and review it with a view to ensuring it was a transaction which was reasonable for the Commonwealth to enter into?

A. I wouldn't put it like that. When I came into it, as I have already given in evidence, my understanding was that all aspects - the key financial aspects of this transaction had already been agreed between the parties. So that's why, when I came into it, I was looking to familiarise myself with what had been agreed between all the parties, not, "Is this something that I think should go ahead or I think shouldn't go ahead?" And what I have said to you is that, in doing that, there were certain features of the transaction which appeared to me to be critical and, indeed, the state manager agreed with me with that view, and the critical feature was the formal valuation advice. So, in order to complete this consideration of what was being proposed, as I said earlier, we decided to speak to the valuer to ensure that his valuation advice hadn't changed and, indeed, that was the impression that he gave.

Q. The critical factor was the valuation advice. You saw it that way and yet it wasn't recorded in any formal way either in your files or his, as far as you understood it?

A. Because the valuation advice was already on record, and wasn't being changed by the advice that he gave us. It was already on record and it hadn't changed.

Q. You were not, in February 1992, according to your evidence, attempting to assess whether or not this transaction was a reasonable one or good value for the Commonwealth, were you?

A. Not really, no.

Q. According to your evidence you weren't?

A. That's right.

Q. Did you, at some later stage, make that assessment?

A. I think, based on the advice and the strength of conviction of the valuation advice, I certainly felt that the - what was being proposed was valid and appropriate.

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Q. Based on what - further advice you took or a rethink about what you already had, or what?

A. Based on the advice given by the valuer.

Q. Back in February?

A. In February.

Q. So at some later point you formed the view that the transaction was a reasonable one based upon what you had been told back in February, even though back then, that was not a process you were undertaking; is that what your evidence is?

A. Well, I think in the process of looking to familiarise myself with the details of what was being proposed, I came to a view about it, and that view was a view that was based on the advice of professional experts and, in particular, the expertise of the valuation office.

Q. You see, when you wrote this paper that I have been asking you about for the Audit Office, you were, I suggest, seeking to justify this transaction, firstly, and, secondly, seeking to suggest not only was it justifiable, but it was a good-value transaction from the Commonwealth's perspective; would you not agree?

A. I don't know that I was seeking to justify the transaction. What I was seeking to do was demonstrate to people the basis on which the proposal had been established.

Q. I suggest you were seeking to justify it because, by then, it had been subjected to a good degree of criticism in Senate Estimates hearings, of which you were well aware?

A. Well, I don't deny that I was presenting the material in a way that put the Commonwealth's view of the proposal in a favourable light, but my belief was, at that point in time, as I keep repeating, based on valuation advice, that it was a reasonable deal for the Commonwealth.

Q. Were you concerned that the APG might be criticised in September 1992 and subsequently, for allowing this transaction to proceed on the terms that it did?

A. I had a concern about the reputation of the Australian Property Group acting on behalf of its clients, but at all times in this whole transaction and others, we were reliant on professional advice from others in

1 formulating our views and, in particular, from the
2 valuation office and from the Australian Government
3 Solicitor's Office.
4

5 Q. Were you concerned in September 1992 and subsequently
6 that you might be criticised for allowing this transaction
7 to proceed upon the terms that it did?

8 A. No, I don't think so, because I don't think I ever
9 felt that I had a decision-making role in relation to what
10 was proposed and adopted.
11

12 Q. Did you not ever think, subsequent to the transaction
13 being entered into, that perhaps you should have taken
14 steps to prevent it from being entered into?

15 A. No, because there was nothing in the advice provided
16 to me, as I repeat, particularly the valuation advice,
17 which suggested that.
18

19 Q. Is that the position you still take - that is, that
20 you do not consider that you have any responsibility for
21 this transaction being entered into on behalf of the
22 Commonwealth?

23 A. Well, I'm not quite sure that that's exactly what I'm
24 saying. What I'm saying is that whilst I didn't play an
25 active role in the establishing the detailed terms and
26 conditions of this proposal, it clearly wasn't formally
27 signed off at the time that I came into it, but,
28 nevertheless, details had been agreed. What I'm trying to
29 convey to you is that at no stage did I believe that what
30 was being proposed was something that I had proposed or
31 decided or negotiated.
32

33 Q. Well, is this a fair summary of what you thought -
34 that someone else had negotiated the deal, it had
35 valuation office support, you felt it still had valuation
36 office support, so that you personally were not and could
37 not be held to be responsible for it?

38 A. No, that I had no basis on which to otherwise
39 question what was proposed.
40

41 Q. Do you know Mr McFadden from Lend Lease?

42 A. Yes, I do.
43

44 Q. Did you meet with him in the context of these Senate
45 Estimates hearings in 1992?

46 A. I have no recollection of meeting with him in that
47 context. You know, you may have something there that

1 suggests that I did. I would be interested to see. But I
2 have no recollection at this point in time.

3
4 Q. Let me try and jog your memory. Did you meet with
5 him after the Price Waterhouse report came out but in the
6 context of questions that Ms Bishop was asking in the
7 Senate, Senator Bishop?

8 A. I may have, but I have absolutely no recollection of
9 doing so.

10
11 Q. Would you have been tick-tacking with him about how
12 the Senate should be answered about this transaction at
13 that time?

14 A. I don't recall doing so. I may have. I'm not saying
15 that I didn't; I am just saying that I have absolutely no
16 recollection of talking to him about it.

17
18 Q. Did he come along at some stage and meet with you to
19 set your mind at rest about the fundamental commercial
20 terms embodied in this transaction?

21 A. Well, I'm trying to exercise my mind to see if there
22 is any gem of recollection of such a meeting, and I don't
23 recall anything of that nature. I keep saying, it might
24 be possible, I'm just saying I have got absolutely no
25 recollection of it.

26
27 Q. Did he come along and have a chat with you about the
28 general state of the market in the context of Senator
29 Bishop's queries and the Price Waterhouse report?

30 A. Not that I recall. He may have. I just don't --

31
32 Q. No recollection?

33 A. I just don't have any recollection of discussing this
34 with John McFadden at all. I mean, I may have, but I just
35 don't have any recollection of doing it. I think my main
36 interaction with him had been in settling the detailed
37 terms and conditions of the documentation early in 1992.

38
39 Q. What was his role in that?

40 A. Well, I think - look, I don't remember for certain,
41 even, if he had been there, but there were a series of
42 meetings where details were settled in relation to the
43 contract documentation. I think he may well have been a
44 party to those discussions.

45
46 Q. Did you prepare any paper or submission to be given
47 to the Senate Estimates Committee of which Senator Bishop

1 was a member in September/October 1992?
2 A. I don't recall.
3
4 Q. The paper I showed you a little while ago --
5 A. Yes.
6
7 Q. -- was that a paper that was prepared with a view to
8 it going forward to the Senate Estimates Committee?
9 A. The paper of September 1992?
10
11 Q. Yes.
12 A. No, I don't believe so, no. I certainly never
13 prepared it with that in mind.
14
15 Q. Do you have any recollection of preparing a paper at
16 around about that time not for Senator Bishop, but for
17 submission to a Senate Estimates Committee?
18 A. I think the document that you showed me earlier,
19 which had a series of questions on it and answers that we
20 discussed at length - I think they were asked of us in the
21 context of the Audit Office preparing for a Senate
22 Estimates hearing.
23
24 Q. Right. And did you discuss the answers that should
25 be given in that context in a paper for the Senate with
26 Mr McFadden?
27 A. I have no recollection of doing so. I may have. I
28 have just got no recollection of doing so. I'm sorry.
29
30 MR FOSTER: I have no further questions for Mr Ferrari.
31
32 THE COMMISSIONER: Q. Mr Ferrari, while you are on that
33 document that we have been looking at for some time, would
34 you have a look at the page 5 of it, CH94.004.0337, under
35 the heading "Actual Rent Level". Have you found that?
36 A. Yes.
37
38 Q. You go on to say why it was inappropriate to compare
39 the various leases that Price Waterhouse had looked at
40 with the Centenary House for a number of reasons. On the
41 top of the next page, you say:
42
43 *5) none of the buildings were designed to*
44 *meet a particular tenant's needs such as*
45 *arrangement of space, security, et cetera.*
46 *The Centenary House is ...*
47

1 A. Yes.

2

3 Q. Now, on the next page, when you are coming to deal
4 with the relevance of that, you say at the top of the
5 page:

6

7 *Furthermore, the design of the building to*
8 *a tenant's specific requirements is not*
9 *just an additional advantage to the tenant.*
10 *It can also represent an increase in cost*
11 *and risk to the lessor.*

12

13 A. Yes.

14

15 Q. Your purpose there was to suggest, was it not, that
16 Centenary House was purpose-built to such an extent that
17 it justified a higher rental being charged?

18 A. No, I don't think so. No, I think it is attempting
19 to say that in the course of this proposal one of the
20 particularly attractive features that made it more
21 attractive to the Commonwealth, and less attractive to the
22 developer, was the fact that it specifically reflected the
23 intended tenant's particular requirements, which may have
24 meant, then, that that tenant might have been the only
25 potential occupant for the building.

26

27 Q. That's where you are driven to go, isn't it? The
28 building would not be suitable for other tenants,
29 therefore the additional costs involved in the
30 purpose-built building justified a higher rent from the
31 lessor's point of view?

32 A. I don't think I was putting it so much as justifying
33 a higher rent, as justifying why the developer would be
34 anxious to ensure that there was an arrangement that
35 didn't leave them, at the end of a tenancy period, with a
36 building unpaid for --

37

38 Q. With a building that nobody else could use?

39 A. A building unpaid for that nobody else could use.

40

41 Q. Have you seen Centenary House?

42 A. I have.

43

44 Q. Did you see it before you wrote that?

45 A. No, I don't think so.

46

47 Q. Had it been described to you, the way in which it had

1 been purpose-built?
2 A. Yes.
3
4 Q. There is a main entrance from the street which leads
5 into a foyer - that's so, isn't it?
6 A. It is a long time since I have been in the building,
7 but yes, I seem to recall that.
8
9 Q. And on the right-hand side there is a separate
10 entrance into the ALP's own area - their office?
11 A. Yes.
12
13 Q. That is part of the ground floor, the right-hand side
14 of the building, past the foyer?
15 A. Yes.
16
17 Q. They have no direct access or they share no amenities
18 with the rest of the building which was to be occupied by
19 the Audit Office?
20 A. Yes.
21
22 Q. Can you tell me anything else about the building,
23 other than that, which was purpose built?
24 A. I don't recall, at the time, other than some general
25 impressions that I have about the layout of the floors,
26 the size of the floors, the way the auditor was anxious
27 for the area to be structured and how people would occupy
28 the space. I think there was some decision about people
29 not having fixed offices, that the arrangement of the
30 space was such to reflect the need that the Auditor had
31 for numerous changing requirements about teams of people
32 being put together and then working together for a little
33 while and being dispensed. So there were consequences of
34 that in relation to how the floors might be laid out, the
35 distance of space from side of the building to side of the
36 building, whether or not that would have been useful in a
37 normal office configuration to some future tenant. It was
38 those sorts of things which seemed to be particular
39 requirements of the Auditor.
40
41 Q. What you are suggesting is that the Auditor-General
42 wanted a space which was flexible so that if he had
43 changes in the way in which he wanted to run his office,
44 there were no costly alterations to be made to the
45 structure?
46 A. I think it was the other way around. I think he had
47 particularly in mind how he wanted to set the building up

1 to operate, and that's how he wanted the building shaped
2 and configured. Whether or not that would leave the floor
3 space of an unconventional and not-particularly useful
4 space and configuration to someone in the future, I think
5 was the point.
6

7 Q. I am sorry, I may have misunderstood your very long
8 answer previously, but I thought you were saying that the
9 Auditor-General wanted to be able to have a premises that
10 didn't bind him into having small rooms or whatever; that
11 he could move people around as the nature of his
12 activities changed?

13 A. Yes. That was a feature of how he expected to occupy
14 the building, yes.
15

16 Q. So that really required a completely open-plan
17 building, did it not?

18 A. It did.
19

20 Q. And that's what it is?

21 A. I suspect so, although I haven't been in it for many
22 years.
23

24 Q. Why would you suggest that a completely open-plan
25 building would be useless to somebody who came in later
26 and would have the opportunity of putting up walls and
27 divisions wherever they wanted to?

28 A. I don't know that I - I certainly haven't intended to
29 convey that it would be useless for that purpose. I was
30 more trying to convey to you - and I am sorry that I'm not
31 able to be more specific about what particular
32 requirements the Auditor had, but there were features, I
33 do recall, about the configuration of the building that
34 were done to satisfy the concerns that the Auditor had
35 which then reflected his views.
36

37 Q. Just stopping you there - I am sorry, if I don't stop
38 you, we will let you go on forever, if I may say so.

39 A. I am sorry.
40

41 Q. What I am asking you is what was there about this
42 building which satisfied the Auditor-General's
43 requirements which would have made it difficult for the
44 lessor to let it to some other place, other organisation,
45 after the Audit Office had moved on?

46 A. At this point in time, I'm not able to answer your
47 question.

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THE COMMISSIONER: Thank you. Do you want to ask any questions about that, Mr Foster?

MR FOSTER: No, Commissioner.

<EXAMINATION BY MR SACKAR:

MR SACKAR: Q. Can I take that theme up with you immediately, Mr Ferrari, so that perhaps we can assist you to go back to what you thought the words "purpose-built" were before Mr Morling. Do you have the folder which was prepared for you, or for us, at least, with a lot of tabs in it?

A. No, I don't.

THE COMMISSIONER: What tab is it?

MR SACKAR: If I can assist you, Commissioner, I am going to take the witness to a statement which was provided to Mr Morling, which is behind tab 2 in that bundle.

Q. Mr Ferrari, I am going to ask you if you have it handy to go to your statement dated 20 July 1994, CH94.004.0330; do you have that?

A. I do.

Q. Can I take you, please, to paragraph 18 of that statement.

A. Yes.

Q. You said in paragraph 18 to Mr Morling:

In my view Centenary House was a purpose-built building because the specifications of the Commonwealth's requirements in this case were much higher than in a normal office building.

Can you recall - maybe not - what you had in mind back in 1994 when you wrote or signed this statement for Mr Morling in relation to that sentence?

A. I don't think I could give you a complete answer, although I do recall that one of the real difficulties that the Commonwealth was experiencing at this time in other privately owned accommodation that was leased by the Commonwealth, was continual difficulties with services

1 like airconditioning, and I have a recollection that one
2 of the strong emphases, giving the specification of what
3 the Commonwealth would require in this building, was
4 assurance that services in the building would operate
5 effectively and efficiently over the time of the lease.
6

7 Q. Perhaps that's one item. Do you have anything else
8 in mind? Perhaps if I read on:

9
10 *In addition the configuration of the*
11 *floors, lifts, toilets, et cetera, to*
12 *ANAO's requirements could make it difficult*
13 *to efficiently reconfigure for other*
14 *tenants.*
15

16 Do you remember what you had in mind when you wrote that?

17 A. No, I have a recollection - when I was trying to
18 answer the questions before, I had a recollection that
19 there were features of that nature, but quite what they
20 were, I don't recall in detail. I must have had something
21 in mind when I wrote those words, but what it was, I don't
22 remember.
23

24 Q. You were aware, were you, as a result of becoming
25 familiar with the transaction and the events which
26 occurred after, let's say February/March of 1992, that
27 persons from the Audit Office were in close collaboration
28 with the owners of the building in relation to the fitout?
29 A. Oh, yes. Yes.
30

31 Q. And you were aware, were you, that they were meeting
32 on a not infrequent basis in relation to the way in which
33 the fitout was to be implemented and the type of fitout
34 that was to occur?

35 A. Yes, I recall that.
36

37 Q. As it were, if you like, the Auditor-General had the
38 first crack at this building as to how the building would
39 be fitted out and how it would be configured, whatever
40 else a subsequent tenant may or may not wish?

41 A. Oh, yes, certainly.
42

43 Q. You answered some questions a little earlier this
44 morning where you thought you could recall some other
45 leases around Australia, or elsewhere, where there was no
46 reversion of ownership but where a building had been built
47 with long-term leases, rent escalators and matters of that

1 sort; do you remember that?

2 A. Yes.

3

4 Q. Could I ask the operator to bring up CH94.012.0330.
5 I don't suggest you prepared this document, but do you see
6 there a list of buildings headed "Leases for terms of 15
7 years or more" and then there is the ACT, New South Wales,
8 and do you see the other various States referred to?

9 A. Yes.

10

11 Q. You see the heading, "Leases 10 years or more with
12 fixed escalators but without market reviews" and then a
13 whole series of examples given?

14 A. Yes.

15

16 Q. And you will notice, if you look down the various
17 lists, that there seems to be a significant number of
18 buildings which the Tax Department apparently occupied.
19 So take a moment, without me speaking, and perhaps have a
20 look at those, and see if some of those are the leases
21 that you had in your mind when you answered Mr Foster a
22 little while ago.

23 A. Yes, they are. Indeed, I think there were even
24 others, too.

25

26 Q. Are you aware, you may or may not be, as to how many
27 of these had ratchet clauses?

28 A. No --

29

30 MR FOSTER: I object to that - only for this reason: if
31 there is to be any evidence about what leases do or don't
32 have, then we really need to get the leases. This witness
33 hasn't accepted that he knows anything about the content
34 of these documents.

35

36 THE COMMISSIONER: No, first of all, I wouldn't stop
37 Mr Sackar examining him on it, but I think it would be
38 subject to a requirement that we find out what is in the
39 leases. Are you going to put the terms of them to the
40 witness?

41

42 MR SACKAR: No, because I am going to invite you, or
43 Mr Foster, to require or acquire the terms of these
44 documents. Many of them are documents we couldn't
45 possibly get access to.

46

47 THE COMMISSIONER: Mr Sackar, I'm not suggesting that,

1 but you should address them to Mr Foster. I just sign the
2 documents.
3
4 MR SACKAR: Well, I will urge you to sign them. I really
5 don't want to influence this witness in any way. May I
6 just ask him to step outside the room so that I can
7 explain the provenance of this document?
8
9 THE COMMISSIONER: I will let you go until 2 o'clock,
10 Mr Ferrari.
11
12 MR SACKAR: I won't be very much longer.
13
14 MR FOSTER: Do you need the witness to explain what you
15 want to explain about this document? This has nothing to
16 do with this witness.
17
18 THE COMMISSIONER: I will allow you to, Mr Sackar, if you
19 can, demonstrate how this witness can answer the question.
20 That's what I am speaking about.
21
22 MR SACKAR: I shall.
23
24 Q. Mr Ferrari, take a moment, if you will, and, if you
25 are able, indicate any leases here that you are familiar
26 with from your own experience at APG or otherwise, and, if
27 so, what you know about them in terms of no reversion of
28 ownership, for example.
29 A. My knowledge of individual leases here would have
30 been peripheral - I didn't have a direct part in relation
31 to any of them. Most of them, though, I do recognise as
32 projects which were being arranged at the time around the
33 country.
34
35 Q. Just interrupting you, "at the time", would you
36 agree, around 1991 or 1992?
37 A. Well, my involvement in them was in the second half
38 of 1991.
39
40 Q. Thank you. Keep going.
41 A. Most of them were projects which would not have
42 reverted to Commonwealth ownership at the end of their
43 leases. In fact, I have an idea that the only one that I
44 am sure that did, is the DSS headquarters in Tuggeranong.
45
46 Q. Do you know what the cost was for the reversion in
47 that case?

1 A. No, I don't, off the top of my head, I am sorry.
2
3 Q. All right, thank you. So that's the extent to which
4 you can --
5 A. To which I can help you, yes, I believe so.
6
7 Q. And as at 1991, or thereafter, were you aware that a
8 number of the leases that you have identified, not only
9 had no reversion, but had fixed escalators for a long
10 period of time?
11 A. That was my understanding, yes.
12
13 Q. Mr Coleman, who I gather, sadly, is deceased, what
14 position did he have in the Australian Valuation Office -
15 Mr Malcolm Coleman, I should be more accurate - in 1992 or
16 1993 or 1994; do you recall?
17 A. He was the - I am not sure whether he was called the
18 general manager, but, anyway, he was the senior person in
19 the Australian Valuation Office.
20
21 Q. Are you aware, from your association with any of
22 these transactions in after 1991, whether any of them had
23 what are described as ratchet clauses?
24 A. I - yes, I think they all had ratchet clauses of one
25 form or another. I seem to recall a discussion or
26 discussions about that at the time, and the nature of
27 those ratchet clauses, I think, varied.
28
29 THE COMMISSIONER: Mr Sackar, I hope we don't at this
30 late stage have to define a ratchet clause, but a ratchet
31 clause could be one simply that the market value --
32
33 MR SACKAR: Perhaps the witness can look at the document.
34 There is a description given --
35
36 THE COMMISSIONER: Is this the statement?
37
38 MR SACKAR: The document that is on the screen.
39
40 Q. Would you be kind enough, Mr Ferrari, to have a look
41 at the ATO's office at Bankstown, where it is said the
42 arrangement in part was annual - that is, annual
43 escalator - greater of 8 per cent or market. Now, is
44 that, one, something that you were aware of at the
45 time - that is, back in 1991 or thereafter - or, two, is
46 that the kind of thing that you would describe as an
47 example of a ratchet clause?

1 A. Well, to answer your second question first, yes, I
2 would say that's an example of a ratchet clause. In
3 relation to whether I was aware of the detail in the
4 Bankstown building, then I think I probably would have
5 been in the most general sense.
6

7 THE COMMISSIONER: I think in fairness to Mr Ferrari, it
8 wasn't Bankstown. You have jumped a line. The Bankstown
9 one is "greater of CPI or arithmetic formula".

10
11 MR SACKAR: No, no, I am so sorry, Mr Commissioner.
12 There are two for Bankstown. The one that I meant to
13 identify, but perhaps didn't clearly, was the ATO office
14 in Bankstown.

15
16 THE COMMISSIONER: Yes, I am sorry, I withdraw that.

17
18 MR SACKAR: I thought I said the ATO, but perhaps I
19 didn't. Is that a convenient time?

20
21 THE COMMISSIONER: Yes, we will resume at 2 o'clock.

22
23 **LUNCHEON ADJOURNMENT**
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1 **UPON RESUMPTION:**

2

3 **THE COMMISSIONER:** Yes, Mr Sackar.

4

5 **MR SACKAR:** Q. Can I just take you, Mr Ferrari, briefly
6 to one or two aspects of your statement, which is the
7 evidence that you provided to the Commission, which is
8 exhibit 32. Do you have a copy of your statement provided
9 to the Commissioner in this Inquiry?

10 A. Yes, I do.

11

12 Q. Would you be kind enough to turn to paragraph 26.
13 Just so that I can place the activity that you described
14 in paragraph 26 in correct chronological sequence, you
15 will notice that paragraph 26 precedes matters dealt with
16 in paragraphs 27 and following. They, in turn, deal with
17 your discussion with Mr Holden and your eventual meeting
18 with Mr Jeffress?

19 A. Yes.

20

21 Q. You say in paragraph 26 that you recall that you
22 carried out some research for yourself, and then the
23 documents that are referred to are the documents which I
24 think you were asked some questions about this morning,
25 namely, figures 1 and following; do you remember those
26 graphs that Mr Foster took you to?

27 A. Yes, I do.

28

29 **THE COMMISSIONER:** Mr Sackar, I notice Mr Ward is not
30 here. Does anybody know where he is?

31

32 **MR SACKAR:** No. His things are here. I imagine - would
33 you prefer that I didn't go further?

34

35 **THE COMMISSIONER:** I'm just wondering. My impression is
36 that you will not be saying something to this witness's
37 discredit.

38

39 **MR SACKAR:** No.

40

41 **THE COMMISSIONER:** We will wait until we hear something
42 from Mr Payne.

43

44 **MR SACKAR:** Yes. Mr Payne has gone outside to see if we
45 can find him. He may have got lost in the crowd, or
46 something. Thank you, Commissioner, I must confess, I
47 hadn't realised he wasn't here.

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MR PAYNE: He hasn't been sighted, Commissioner.

MR SACKAR: Perhaps I should continue on that basis, unless Mr Ferrari would wish him to be here.

THE COMMISSIONER: Mr Ferrari, it is a matter for you. You have got counsel appearing for you. Mr Sackar is hardly going to say something to your discredit, but it is up to you; you have got counsel now, if you would prefer us to wait, we will.

THE WITNESS: No, I think I'm comfortable to proceed.

THE COMMISSIONER: Very well, thank you.

MR SACKAR: Q. May I just ask you, then, if I can take you back to what I was just seeking to clarify, which was the exercise that you say you did in paragraph 26 and the reference to the documents. When you say, "These are reported" by that one takes it to be, does it, the research or the rental growths, perhaps, that are reported in those figures 1 to 6?

A. Yes, it's the research on the rental growths.

Q. All right. Just to make it abundantly clear, did you do any research of that kind at all yourself - I will come in a moment to any aspect of that that you wish to elaborate upon - before you met Mr Jeffress, or is that paragraph out of order, in the sense that the materials that comprise the various graphs, figures 1 to 6, you meant by that paragraph to indicate you'd done later in 1992, for the purposes of the presentation that you then undertook in September?

A. That's precisely the order it happened, yes.

Q. That's fine, thank you. One last matter - or perhaps two last matters - in paragraphs 29 through to 32, you generally deal with the question of Mr Jeffress, or, rather, Mr Holden and you, then Mr Jeffress, and in paragraph 30, your meeting with Mr Jeffress and your handwritten note which Mr Foster has taken you to on a couple of occasions at least?

A. Yes.

Q. Then in paragraph 32 you say:

1 *If I had been advised by Mr Jeffress --*

2

3 Et cetera --

4

5 *I would have raised any concerns...*

6

7 Et cetera. Do you see that?

8

9 A. Yes, I do.

10

11 Q. May we take it that if Mr Jeffress had said anything
12 in the course of your meeting by way of a concern on his
13 part as to the valuation exercise he'd undertaken the
14 previous year, you would have regarded that as noteworthy?

15

16 A. Yes.

17

18 THE COMMISSIONER: Q. I'm a little worried. Perhaps you
19 would be able to clear it up; I don't know. The last
20 sentence of paragraph 30, "I believe there was also
21 discussed", it seems to me it should have been the subject
22 of principal discussion. I see that Mr Ward has arrived.

23

24 MR WARD: I do apologise, Mr Commissioner.

25

26 THE COMMISSIONER: We did consult your client. He
27 thought that at the hands of Mr Sackar he could come to no
28 harm. He agreed to proceed.

29

30 Mr Sackar, if you like, you could ask him that or I
31 could ask him that.

32

33 MR SACKAR: No, no, perhaps I can take it up, and then if
34 you don't cover the field, then undoubtedly,
35 Mr Commissioner, you will raise what is on your mind.

36

37 Q. Could you please turn, if you have it, to your
38 handwritten note, or to tab 9 of the bundle, whichever is
39 most convenient.

40

41 A. That's the handwritten note of the meeting with
42 Mr Jeffress?

43

44 Q. On 28 February with Mr Jeffress?

45

46 A. Yes, I have that.

47

48 Q. It is CH94.006.0029. You were referred to
49 paragraph 30, and, in particular, perhaps I will read the
50 last two sentences:

51

1 *I recall that at that meeting Mr Jeffress*
2 *advised that he saw no reason to alter his*
3 *earlier advice. I believe that the ratchet*
4 *clause in the proposed lease was also*
5 *discussed.*

6
7 A. Yes.

8
9 Q. With the benefit of your note, or otherwise, but
10 indicate which, what leads you to believe that the ratchet
11 clause was discussed?

12
13 MR FOSTER: I asked him that.

14
15 MR SACKAR: I know you did. I didn't know whether that
16 was the matter the Commissioner wanted to clear up.

17
18 THE COMMISSIONER: Q. Is there anything in your note
19 here that indicates that it was discussed?

20 A. Yes.

21
22 Q. Where?

23 A. The second line, "Return to market". Now, that's
24 shorthand for what was being discussed and what was being
25 told to me at the time, but --

26
27 Q. "Return to market" means simply a market review,
28 doesn't it?

29 A. Yes. Yes, but the fact that that market review only
30 worked in one direction as opposed to another, I accept
31 that that note doesn't quite say that, but that's - but
32 that's, to my way of thinking, a clear indication of
33 something that would have been covered at that point.
34 Otherwise, Mr Jeffress wouldn't have been giving us
35 complete information about the relevant factors at all.
36 That's why I say I believe that that's the case.

37
38 MR SACKAR: Q. All right. And the word "sop" meaning
39 to indicate - whether it is your word or his - that that
40 was part of the negotiation process which led to the
41 reduction of the 10.5 to the 9 for the balance of the
42 term, or for the term?

43 A. That's right.

44
45 THE COMMISSIONER: Mr Foster, I'm sorry if I didn't
46 perceive that you had asked him that.

47

1 MR FOSTER: I had.
2
3 MR SACKAR: I thought he had too, but I'm never quite
4 sure.
5
6 THE COMMISSIONER: Mr Ferrari, I have to say, some of the
7 answers were so long I had difficulty keeping up.
8
9 MR SACKAR: One last comment.
10
11 Q. Could I please take you again to your statement of
12 20 July 1994. I will get the particular page brought up
13 to save you time, if you haven't got it readily to hand.
14 It is CH94.004.0328.
15 A. Yes, I have that.
16
17 Q. Would you be kind enough, please, to turn to
18 paragraph 7. Apart from your gaining the impression, are
19 you able to amplify, if not it doesn't matter - when I say
20 it doesn't matter, if you are unable to amplify because of
21 the lapse of time, so be it - anything further about why
22 it was you gained the impression you refer to in
23 paragraph 7?
24 A. No, I certainly couldn't put my finger on anything
25 specific.
26
27 Q. You did have discussions, do I understand you to say,
28 with people from the Audit Office between February, or in
29 February and March - certainly in the period prior to the
30 signing up of the commitment to lease?
31 A. I certainly had meetings with them, yes.
32
33 Q. And you weren't deliberately being secretive, I take
34 it, in those meetings about any terms and conditions about
35 which you were aware and which were part of the lease?
36 A. Absolutely not.
37
38 Q. I take it the impression was gained because, although
39 you can't recall any precise instances, you believe that
40 you would have discussed with people from the Audit Office
41 in differing contexts, perhaps differing aspects of the
42 lease during the final countdown to the documentation
43 stage?
44 A. Yes.
45
46 Q. I said that was the last question. This is now the
47 last question. In any of the transactions involving

1 buildings in which the Tax Office took up office space, do
2 you recall whether it was Barclays who were involved in
3 some or all of those transactions - Barclays Bank?
4 A. I don't recall.
5
6 MR SACKAR: Thank you. I have nothing further.
7
8 THE COMMISSIONER: Thank you. Mr Beech-Jones?
9
10 **<EXAMINATION BY MR BEECH-JONES:**
11
12 MR BEECH-JONES: Q. Could the operator bring up
13 CH94.019.0120. Mr Ferrari, you will see that's the
14 transcript of some questions you were asked --
15 A. Sorry, it hasn't come up on my screen yet.
16
17 Q. When it does come up, you will see it is the
18 transcript of some questions you were asked before
19 Mr Morling back in 1994.
20 A. I see.
21
22 Q. You will see at line 41 he asked you whether you were
23 familiar with the files; do you see that?
24 A. Yes.
25
26 Q. At line 54 he asked you:
27
28 *Q. Well, I am asking you about the*
29 *documentation in the files that you assumed*
30 *when you assumed responsibility for this*
31 *project. That is the documentation I'm*
32 *asking you about.*
33
34 Your answer was:
35
36 *A. I certainly read the information that*
37 *was on the files.*
38
39 Do you see that?
40 A. Yes.
41
42 Q. Can I just ask you to read to yourself down to the
43 end of the page.
44 A. Yes.
45
46 Q. You have read that?
47 A. I have read that.

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Q. That evidence is correct?

A. I've got no reason to suspect it is not.

Q. Do you see a reference to a document called the heads of agreement?

A. Yes, I do.

Q. You weren't taken to it then. We might just take you to it now to confirm what's being referred to. Could the operator bring up CH94.001.0036. Do you see that's a document entitled "Heads of Agreement"?

A. Yes.

Q. It proposes some form of agreement between the ALP, the ACTU, Civil & Civic and the Commonwealth?

A. Yes.

Q. And there are various matters referred to in paragraphs 1 to 4, and if we could go to the next page, you will see in clause 7 there is a proposed clause that says:

The Commonwealth hereby agrees, in consideration of a fee of \$ [blank] payable to it by the Owners on [a date not specified], to assume the tenancy occupancy risk on the building as from the date of practical completion of the building for a period of [blank] months.

Do you see that?

A. Yes.

Q. Just to be clear, you have not seen this document before; is that right?

A. No - that's right.

Q. No-one informed you back in 1992 that any such proposal had been discussed between APG and the Lend Lease interest?

A. Yes, that's right. Not that I recall, and I think I would have recalled.

Q. You became aware that there may have been such discussions only when you were assisting Mr Morling?

A. Yes.

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MR BEECH-JONES: Thank you.

THE COMMISSIONER: Mr Ward?

<EXAMINATION BY MR WARD:

MR WARD: Q. Mr Ferrari, can I take you to the documents referred to in your statement, firstly the file note that you made of your conversation with Graham Jeffress, which is at tab 9, document CH94.006.0029.

A. Yes.

Q. You were referred to the third dot point by counsel assisting the Commission, which is the point that I think reads:

Contribution to fitout has long term --

Is that "implication"?

A. Yes.

Q.

...on rent paid.

Can I take you next to your briefing note - I want to tie two things together here, so I'm flipping between two documents - to the ANAO, which is at tab 11, document CH94.004.0341. I apologise, that is a page in the course of it; it begins at point 0333. At page 5, I think it was, of that document, under heading (d), "Summary size of the escalator", document CH94.004.0337 --

A. Yes.

Q. -- you refer to taking into account other factors which mean that the escalator may be as low as 7.5 per cent per annum?

A. Yes.

Q. Does that conclusion in that document relate to the third dot point in your file note of your discussion with Mr Jeffress?

A. It's the same point, yes.

Q. Can I take you, next, to the figures that accompanied that briefing, beginning at document CH94.002.0203. I want to refer you particularly to figures 2, 3 and 6.

1 A. Yes.
2
3 Q. Mr Foster took you to the 1982 rents for each of
4 Bligh House and John McEwan House?
5 A. Yes.
6
7 Q. He invited you to take the average of those and
8 compare them to the 1982 rate at figure 6.
9 A. Yes.
10
11 Q. Can I ask you to do the same with the 1990 figures.
12 So, in figure 2, the 1990 figure for Bligh House there is
13 \$277?
14 A. Yes.
15
16 Q. And then over the page at figure 3, for John McEwan
17 House, the 1990 figure is \$225?
18 A. Yes.
19
20 Q. At figure 6, the 1990 figure is \$280?
21 A. Yes.
22
23 Q. Does that assist you as to whether or not other
24 buildings were considered in the compilation of figure 6?
25 A. Well, yes, it certainly clearly indicates that in
26 relation to 1990, and perhaps other years, there were
27 other buildings involved.
28
29 Q. Can I ask you this also about those figures, based on
30 your experience at that time: would it be likely to be
31 the case that a new building, as opposed to what by then
32 were 10 years older, John McEwan House and Bligh House,
33 would attract higher rents than an aged building?
34 A. Yes, you would expect so.
35
36 Q. Can I then take you back to your presentation,
37 tab 11. At page 11 of that, which is document
38 CH94.004.0343, Mr Foster in the course of his questions to
39 you, referred you to the passage in the final paragraph
40 beginning, "During the last year"; do you see that
41 sentence there?
42 A. Yes.
43
44 Q. I want to take you just to exactly what Mr Foster
45 asked you, because I think there was a word missing from
46 the quote. This is at transcript page 1307, the bottom of
47 the page, where Mr Foster put to you that quote, as

1 "during last year", not "during the last year" and asked
2 you then whether that was 1991 you were referring to as
3 opposed to the year the 12 months up to September 1992,
4 when you prepared this document?

5 A. Yes.

6

7 Q. There was no clear answer, from my reading of your
8 answers following that. Can you clarify whether you are
9 referring to 1991, or the 12 months from September 1991 to
10 September 1992?

11 A. I think I was referring to the latter, and the reason
12 I say that is because I think some of the information
13 would have only become available in - towards the middle
14 of 1992.

15

16 Q. Thank you. I just have two more things to clarify
17 with you. The first is, Mr Foster put it to you that it
18 would have been prudent to have confirmation from
19 Mr Jeffress of the opinion he expressed when you met with
20 him to confirm the valuation in early 1992. Can I ask you
21 this: was it your usual practice to obtain written
22 confirmation of opinions where nothing had changed?

23 A. No, I would say not.

24

25 Q. Was it a practice you were familiar with existing in
26 the office?

27 A. No.

28

29 Q. Did you have any concern that it might have needed to
30 be confirmed in writing at that time?

31 A. No. Indeed, I think at the time I didn't think it
32 needed to be confirmed in writing because it hadn't
33 changed anything.

34

35 Q. The final matter I wish to raise with you is
36 concerning the questions that Mr Foster put to you
37 regarding leases where there is a reversion or transfer of
38 ownership at the end of the lease period to the
39 Commonwealth; do you recall Mr Foster's questioning along
40 those lines --

41 A. Yes.

42

43 Q. -- or regarding that issue?

44 A. Vaguely, mmm-hmm.

45

46 Q. Can I ask you this: with your experience in the
47 Australian Property Group, had you ever dealt with any

1 leases which involved a reversion where the land itself
2 was not owned by the Commonwealth before the building was
3 built?
4 A. I don't recall having dealt with such cases, but not
5 having looked at the range of leases that were brought up
6 on that other document, and not having the benefit of
7 having thought about that for any length of time, I'm not
8 sure that I can be certain about the answer to that
9 question.
10
11 MR WARD: Those are the only matters, Commissioner.
12
13 THE COMMISSIONER: Mr Foster?
14
15 MR FOSTER: I don't have anything further.
16
17 THE COMMISSIONER: Thank you, Mr Ferrari, for coming back
18 again. I hope we don't need you any more. You are now
19 free to leave subject to any recall.
20
21 **<THE WITNESS WITHDREW**
22
23 MR WARD: Commissioner, may I be excused?
24
25 THE COMMISSIONER: Yes.
26
27 MR WARD: I apologise for my late arrival.
28
29 MR SACKAR: Commissioner, I said before lunch in a
30 question, or just after lunch, perhaps, that I thought
31 Mr Malcolm Coleman might have been dead. I think I said
32 "sadly" he was dead. The person I believe who told me
33 that now denies he told me that. So I wouldn't want to
34 dissuade counsel assisting from trying to continue to find
35 him, or not, but certainly I didn't intend any disrespect,
36 nor wish that he would be in that state if he isn't.
37
38 THE COMMISSIONER: Thank you for your admissions.
39
40 MR FOSTER: I call Mr McFadden.
41
42 MR BEECH-JONES: Commissioner, I seek leave to appear for
43 Mr McFadden.
44
45 THE COMMISSIONER: Yes, Mr Beech-Jones.
46
47

1 <JOHN SEYMOUR MCFADDEN, affirmed;

[2.30pm]

2
3 <EXAMINATION BY MR FOSTER:

4
5 MR FOSTER: Q. Would you tell us your full name,
6 address and occupation, please?

7 A. My name is John Seymour McFadden, 87 Springvale
8 Drive, Weetangera, ACT, 2614. I'm a development
9 consultant - development management consultant.

10
11 Q. Are you any longer employed by any company within the
12 Lend Lease Group or Civil & Civic group?

13 A. I left Lend Lease Development in 1999 as a
14 consultant. I have been engaged by Lend Lease for the
15 last five years to finish off a project called Fernhill
16 Park, a joint venture with Lend Lease and the Hindmarsh
17 group in Canberra. I haven't worked for Lend Lease
18 probably for the last month or two. I haven't worked for
19 anybody in the last month or two, really.

20
21 Q. During the periods between 1999 and the last month or
22 two, whilst you were a consultant, did you spend most of
23 your time working for Lend Lease in the context of the
24 Fernhill Technology Park?

25 A. And I spent most of my time working for the Hindmarsh
26 Group in the context of the Fernhill Technology Park, but
27 I was Lend Lease's representative in the joint venture,
28 but most of the development activities had been assigned
29 to the Hindmarsh Group. The reason it stayed that way was
30 that the Hindmarsh Group preferred that Lend Lease remain
31 as the land owner during the period of development. The
32 holding lease was assigned in June, July, this year. So
33 then after that, the joint venture's been able to come to
34 an end.

35
36 Q. Forgive me for asking you this, it may be a bit
37 difficult for you to answer, in one sense, but would you
38 be able briefly to describe for us what the Fernhill
39 Technology Park is?

40 A. The Fernhill Technology Park was established in 1984,
41 or thereabouts. It was a 36-hectare estate set up for a
42 technology park. Lend Lease won a competition back in
43 that period to develop the technology park, a development
44 deed was put together with the Commonwealth of Australia.
45 There were three parts of that development deal, I think.
46 There was a holding lease, there was a deed of agreement
47 covering the development of infrastructure works, roads,

1 et cetera, and also a companion deed which set out the
2 relationship between the Commonwealth and Lend Lease in
3 terms of the marking of the estate and how the parties
4 were to relate to each other during the development of
5 Fernhill Park.
6

7 Q. Can I just stop you there for a moment. I can see
8 that there is a frenetic attempt by the court reporters to
9 keep up with you. Would you mind slowing down a little
10 bit.

11 A. I will try.
12

13 Q. Thank you.

14 A. Do you want me to continue on with Fernhill?
15

16 Q. Yes. I interrupted you.

17 A. The reason Fernhill was established, it was an
18 attempt to diversify Canberra's industry base and to bring
19 the new Sunrise industries into Canberra. A predecessor
20 of mine at Lend Lease had travelled to America, seen how
21 Silicone Valley had operated, had done a lot of extensive
22 marketing work in Australia to see what companies were
23 interested. I think they had a six-month period with the
24 Department of Territories and Local Government to come
25 together with a final proposal to develop the park.
26 That's basically what the technology park was.
27

28 Over the following probably 10 to 15 years we
29 developed nine buildings with a mix of tenants like
30 Hewlett Packard. National Mapping was the first
31 government tenant to go into the park, part of the
32 Department of Administrative Services. AUSLIG was a later
33 one, the Australian Survey and Land Information Group,
34 they were a spin-off of NatMap. There was the Australian
35 Centre for International Agricultural Research, Telstra.
36 ComputerPower took a building in the park, but didn't
37 occupy it. I think that was occupied by the Tax Office
38 and later by the Australian Institute of Health and
39 Welfare. We had a multi-tenant building with lots of
40 small tenants. I think Panasonic and smaller tenants,
41 smaller companies were involved there. It was an attempt
42 to develop a technology industry in Canberra.
43

44 About five years ago, towards 1999, Lend Lease
45 decided it wanted to divest itself of Fernhill Park. I
46 was able to put together a joint venture with the
47 Hindmarsh Group in Canberra. In many ways, I think, the

1 whole of Canberra is a technology park. It certainly was
2 through the 15 years that Lend Lease was involved. We had
3 a lot of feedback from government tenants and private
4 sector tenants, and they didn't want to be engaged,
5 involved in Fernhill Park. They preferred to be located
6 in the town centres, or wherever. As a consequence, when
7 the Hindmarsh Group took over Fernhill Park in 1999, the
8 Hindmarsh Group set about changing what we call a purpose
9 clause for Fernhill Park to allow for the development of a
10 broader mix of uses, including residential, among other
11 things. So the flavour of the park changed to
12 residential.

13
14 In the years whilst I was involved with Lend Lease in
15 Fernhill Park we had tried to get major government players
16 in, like the Bureau of Mineral Resources, a major
17 government organisation, probably 20,000 metres in area.
18 We were unsuccessful in getting that sort of tenant into
19 the park. I think the largest tenant we had was probably
20 AUSLIG at a bit over 4,000 metres, 4,500 metres. It was a
21 lot of hard work, Fernhill Park.

22
23 At the same time, Lend Lease had a similar park in
24 Sydney, out at Homebush Bay, which subsequently became the
25 Olympic site. Lend Lease also had a business park site
26 out at Tally-Ho in Burwood. Lend Lease divested the
27 Tally-Ho site in 1998. I actually went down there for
28 12 months to help Lend Lease divest that estate.

29
30 The history of Homebush Bay is probably well-known to
31 you, as it has developed. So Lend Lease had a very long
32 history in Fernhill Park with initially the Commonwealth
33 and then, after self-government, with the ACT Government.
34 It was an interesting arrangement, because there was an
35 arrangement where the Commonwealth and the ACT Government
36 were to assist in the marketing of that estate. We
37 probably didn't implement that agreement as we should
38 have. We didn't follow the letter of the law of that
39 companion deed in probably - in as much detail as we
40 should have. It probably took cognisance of the market.
41 During the time, the initial holding lease of Fernhill was
42 10 years, we had to renew a holding lease for a further
43 10 years. So there were a lot of land issues involved
44 with it.

45
46 Q. And would it be fair to say that it never quite
47 turned out as the technology park that the planners,

1 including yourself, thought it might do when the deal was
2 originally struck?

3 A. I think that's a fairly true assessment. I had a lot
4 of involvement in marketing and promoting in Canberra, as
5 such. We had an association around the technology park
6 called the Bruce Precincts Association, which involved the
7 University of Canberra, Radford College, the Australian
8 Institute of Sport, the Bruce CIT, which is the TAFE
9 college, Calvary Hospital and businesses in Fernhill. We
10 all thought we could collaborate to market technology. I
11 think the way the technology parks have gone since,
12 really, is people realising that there are two components
13 of technology - the businesses and the office development.
14 So we probably had more of an office park with ordinary
15 tenants in it who paid full market rent, whereas emerging
16 technology companies don't like to pay full marketing
17 rent, they are more like incubators. I think the
18 technology park part of Fernhill now, the companies
19 probably more go on to university campuses and look
20 for cheap government - government incubators, they look
21 for cheap rent. Normally start-up companies, which is
22 what Tehchology Park is about, couldn't afford the
23 commercial rent needed to establish high-quality buildings
24

25 Q. You mentioned in the course of your first answer, I
26 think, the ACT Government had a role to play in this after
27 self-government. Was self-government brought into effect
28 about the middle of 1989 in Canberra?

29 A. Around that time, I think, yes - I think. I think
30 the Land Act was 1988 and the Environment and Land
31 Planning Act came in in '91. So it would have been around
32 that time, I think.
33

34 Q. Have you signed a statement for use at this Inquiry?

35 A. I have.
36

37 Q. Do you have the original of that with you?

38 A. I do.
39

40 Q. Do you have a bundle of documents with it?

41 A. A bundle?
42

43 Q. Yes, or is it just a statement?

44 A. No, it is just a statement.
45

46 Q. Would you mind handing the original statement to the
47 court officer. Do you have a copy?

1 A. I have a copy, yes.

2

3 Q. Are the matters of fact in that statement, subject to
4 some corrections which I will take you to in a moment,
5 true?

6 A. Yes, subject to the corrections.

7

8 MR FOSTER: I will tender it at the moment and then take
9 you to the corrections. If there are others you wish to
10 make, let me know.

11

12 **EXHIBIT #51 STATEMENT OF JOHN SEYMOUR McFADDEN,**
13 **DATED 30/8/2004, BARCODED WITS.023.000, AND DOCUMENTS**
14 **REFERRED TO IN STATEMENT**

15

16 THE COMMISSIONER: What about the accompanying documents?
17 It's a shame that the witness doesn't have a bundle. Is
18 there a spare copy for him?

19

20 MR FOSTER: We can give him a working bundle, I think, of
21 what's referred to in the statement. There may be other
22 documents I will take him to.

23

24 MR BEECH-JONES: We have got a spare bundle with the
25 documents.

26

27 MR FOSTER: I don't mind. As long as he has something to
28 work with there that is familiar to him.

29

30 THE COMMISSIONER: We will make the bundle the exhibit.
31 The statement and documents attached to it will be
32 exhibit 51.

33

34 THE WITNESS: Sorry, I was - just to correct the record,
35 I think I was emailed all these documents. But I don't
36 have a hard copy.

37

38 MR FOSTER: That's all right.

39

40 THE COMMISSIONER: The virtue of it is that they will
41 take you to a document behind a particular tab. So if you
42 could work off that volume, I think you will find it
43 easier.

44

45 MR FOSTER: Q. I just want to make sure that I get
46 these corrections right. If I don't, please tell me. Is
47 the first correction you want to make in paragraph 1?

1 A. Yes.
2
3 Q. Do you want to change the dates which are there as
4 "1990 to 1992", to "1989 to 1998"?
5 A. From 1989 to "January 1999".
6
7 Q. All right.
8 A. For the end of '98; "January 1999" is fine.
9
10 Q. Secondly, in paragraph 12, do you wish to insert the
11 word "preferred" in the sentence which is about six lines
12 up from the bottom of that paragraph, between the capital
13 letters "LLDs" and "practice", so it reads "it was LLD's
14 preferred practice"?
15 A. Yes.
16
17 Q. In the second-last line of the same paragraph, do you
18 wish to insert the words, which I'm about to tell you,
19 between the word "the" and "construction" in that line -
20 the words "sale" and "preferably the", so that it reads:
21
22 *...it became clear that the sale and*
23 *preferably the construction of the building*
24 *could not proceed unless the terms of the*
25 *proposed lease were renegotiated.*
26
27 A. Yes, that's correct.
28
29 Q. In paragraph 52, did you wish to delete the word
30 "experience", which is in the first line of that
31 paragraph, and replace it with the word "belief"?
32 A. Yes.
33
34 Q. Are there any other changes that you wish to make?
35 A. No, no.
36
37 Q. Very good.
38 A. Thank you.
39
40 Q. Can I show you a folder. Mr McFadden, what is that
41 folder?
42 A. This folder contains all the notes I had on the
43 Centenary House deal going back to 1992/1993.
44
45 Q. Is that a folder you maintained at the time, that is,
46 during the course of those years when the deal was being
47 dealt with, or is that a folder you put together

1 subsequently in the light of the announcement of the
2 Morling Inquiry?
3 A. I cannot recall that, which way I did it.
4
5 Q. Well --
6 A. This was a file which I gave to Mr Moulis from
7 Freehills before the Morling Inquiry. I don't believe I
8 adjusted anything because of the Morling Inquiry, that's
9 what I'm saying. So it would have been what I had at the
10 time.
11
12 Q. Just excuse me for being a little repetitive on this.
13 The green folder, containing the documents as it does, as
14 you have it in front of you, was a file you gave to
15 Mr Moulis in about 1993 when it was likely that there was
16 going to be some inquiry into this transaction?
17 A. Yes.
18
19 Q. All right. As best as you can tell, the file that
20 you handed to him then is the same file in the same
21 condition --
22 A. Yes.
23
24 Q. -- that it's presently in?
25 A. Yes.
26
27 Q. That was a file that you maintained during the course
28 of your dealings with this transaction; is that how it
29 worked?
30 A. I believe it is, yes.
31
32 Q. And when I say "you maintained", it was literally a
33 file that you used to keep the materials that you either
34 created or received in respect of that transaction during
35 that period?
36 A. That is correct.
37
38 Q. When the transaction was, as it were, completed in
39 terms of the Agreement for Lease, did you keep using that
40 file to put documents in it, insofar as your continued
41 role was concerned?
42 A. After which, sorry?
43
44 Q. After the Agreement for Lease, which was April 1992?
45 A. Did I put more documents in here?
46
47 Q. Yes.

1 A. I did, yes.
2
3 Q. Does that represent, that folder, all of the
4 documents that you either created or received during your
5 involvement with the transaction?
6 A. On the timing, up to - I had put further documents in
7 this file later on, press clippings about inquiries and
8 things like that.
9
10 Q. Yes.
11 A. They have gone out of the file.
12
13 Q. Right.
14 A. But all of the documents which related to my
15 involvement with Centenary House at the time, up to
16 whenever my involvement finished with Centenary House, is
17 in there.
18
19 Q. All right. Okay.
20 A. Yes.
21
22 Q. Have you had a chance to look at that file in recent
23 times?
24 A. No, I haven't. I sent this file up when I was
25 asked - requested some weeks ago, and I did not go through
26 the file. I only went through the file and grabbed one
27 piece - a copy of one piece of paper out of it.
28
29 Q. Which piece was that?
30 A. That was the piece of paper which was the agenda for
31 the July meeting with Mr Hogg.
32
33 Q. The very first document in the file, pretty much?
34 A. Oh, well, it may be in there, yes - if it is. I
35 copied that document and there was a sheet attached to
36 that which had clauses related to the Westpac agreement,
37 which showed all the different risks which could be taken
38 in a lease transaction - non-insurable and insurable
39 risks. I also took out a piece of paper, I copied a piece
40 of paper on the front, which is just Mr Moulis' letter to
41 me, after the Morling Inquiry, returning the file to me.
42 They are the only pieces of paper I copied out of that
43 document before I sent it to Mr Moulis, and I hadn't read
44 it before I gave it back to him.
45
46 Q. As far as you know, that file was never produced to
47 the Morling Inquiry, was it?

1 A. It was sent to Mr Moulis before the Morling Inquiry.
2
3 Q. I understand that. But as far as you know, that file
4 was never produced to the Morling Inquiry?
5 A. I didn't know that.
6
7 Q. Didn't you know that?
8 A. I did not know that, no.
9
10 Q. You did not give evidence to the Morling Inquiry, did
11 you?
12 A. That is correct.
13
14 Q. And you didn't sign any statement that was actually
15 handed over to Mr Morling, did you?
16 A. I gave a statement to Mr Moulis back in - before the
17 Morling Inquiry, I'm sure.
18
19 Q. Yes, but none that was handed over to Mr Morling as
20 far as you are aware?
21 A. Not that I'm aware of, because I wasn't at the
22 inquiry.
23
24 Q. I'm not suggesting you had some role to play in those
25 decisions, I'm trying to establish the facts. Do you
26 understand?
27 A. I understand, but I don't know what the facts were in
28 relation to those documents.
29
30 Q. Right.
31 A. Yes.
32
33 Q. You never met Mr Morling in the context of his
34 inquiry back in 1994?
35 A. No.
36
37 MR FOSTER: Might I have the green folder marked as an
38 MFI? I don't want to tender the whole lot of it, but I do
39 want to have it identified in a way that's appropriate.
40
41 **MFI #2 FILE OF JOHN MCFADDEN, BARCODED**
42 **JM.001.001.0001-JM.001.001.0398**
43
44 MR FOSTER: When that has been done, could it be
45 returned, please, to Mr McFadden.
46
47 Q. Mr McFadden, if you wouldn't mind, I will just ask

1 you to keep that handy, because I will want to go to it
2 from time to time. In paragraph 5 of your current
3 statement for this Inquiry, you mention that you'd had
4 some involvement with the development of the building now
5 known as the Scrivener Building, formerly known as the
6 AUSLIG building, which was leased to the Commonwealth for
7 occupation by AUSLIG; is that right?

8 A. Yes.

9

10 Q. You obviously had quite a significant involvement
11 with Fernhill Park generally, did you not?

12 A. Yes.

13

14 Q. What was the involvement that you had, in brief
15 terms, for the moment, with the leasing out of the
16 building referred to in paragraph 5 of your current
17 statement?

18 A. I recall, and I haven't been back through the AUSLIG
19 files - sorry, I have been back through part of the AUSLIG
20 files in the year or two ago, because we had to
21 renegotiate a lease for Lend Lease about two or three
22 years ago for AUSLIG - or four years, some time ago. I
23 honestly can't recall my detail with the AUSLIG project in
24 this first lease, I think Anne Lenehan was the project
25 manager. I'm not sure when the AUSLIG negotiations had
26 commenced, from the time I came over to Civil & Civic to
27 AUSLIG. I would have helped Anne. I would have taken
28 management responsibility for what she was doing. The
29 part, I remember, of the AUSLIG negotiation that I did not
30 get involved with, I don't believe, was the bit which
31 related to the ongoing sale of the building under the
32 terms that it was sold, with the fixed escalator lease,
33 because that part was done from Sydney, to my best
34 recollection.

35

36 Q. When you say "the ongoing sale of the building", was
37 the AUSLIG building sold separately from the entirety of
38 the Fernhill Park at some stage?

39 A. Oh, yes, it was an individual building.

40

41 Q. Yes.

42 A. Sold in its own right, yes.

43

44 Q. And that was sold, do you recall, in 1991?

45 A. That's what I am saying. I'm not sure of those
46 dates.

47

1 Q. All right. We will come to that to try and help you
2 with that.

3 A. Yes.
4

5 Q. Anne Lenehan was someone who had a lot to do with
6 that building in the 1989 through to 1991 period, was she
7 not?

8 A. I believe she was, yes.
9

10 Q. Do you see in paragraph 6 of your current statement
11 you say that you were approached by Richard McKeon who
12 asked you for your ideas on how the leasing and financing
13 of the proposed ALP Headquarters Building, which became
14 known as Centenary House, could be structured:
15

16 *He said to me words to the effect of "The*
17 *ALP and ACTU are trying to set up a*
18 *development but have not been able to put*
19 *it together. Do you have any ideas?"*
20

21 And then you record some further matters in your
22 paragraph 7. Do you see that?

23 A. Yes, I see that, yes.
24

25 Q. Now, at the point in time at which he approached you,
26 which you have recorded in your paragraph 6 and dealt with
27 in paragraph 7, obviously it appeared the ACTU was still
28 involved in the project; is that right?

29 A. It was when I met with Mr Hogg, and I believe it was
30 when I met with Mr Hogg and when Richard came and talked
31 to me, yes.
32

33 Q. And then fairly soon thereafter it pulled out; is
34 that right?

35 A. I understand it did, yes.
36

37 Q. All right. Well, could you have a look at the
38 document which is referred to in paragraph 8, which is
39 CH94.004.0025.
40

41 MR BEECH-JONES: That's tab 1.
42

43 MR FOSTER: Q. That is your tab 1, yes.

44 A. Yes.
45

46 Q. Is this a document that you prepared?

47 A. Yes. I believe it is, yes.

1
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Q. Is this a document you have prepared to talk to Mr Hogg with Mr McKeon?

A. I believe it is, yes.

Q. As far as the information that's contained within this document is concerned, from whom had you obtained it before you prepared the document?

A. Richard McKeon.

Q. Right. Did you, in effect, have a meeting with Mr Hogg and Mr McKeon and speak to this document to sort of clear your mind as to what it was Mr Hogg was trying to achieve?

A. Yes.

Q. All right. If you look at the first page of the document, which is 0025, under "Current Status":

- * *tenant identified.*
- * *land rent can be paid ie no capital outlay.*
- * *ALP must borrow to develop or seek equity partners.*
- * *ALP has John Curtin House as an asset.*
- * *property market is bad - investors out of market.*
- * *now is not time to sell.*

That's a reference to selling John Curtin House, I assume?

A. Yes, I believe it was.

Q. And:

- * *difficult for developer to realise profit.*

Do you see that?

A. Yes.

Q. The proposition that the property market was bad and that investors were out of the market, was that something you knew yourself at the time?

A. Yes, yes, I was pretty aware of the market conditions at the time, and I think it also related to the AUSLIG deal. I mean, I wrote the statement, so I must have been aware of it.

1
2 Q. Yes.
3 A. Yes.
4
5 Q. And that was your view --
6 A. That's my view of the market at the time, yes.
7
8 Q. In particular, of the property market in Canberra at
9 the time?
10 A. Yes.
11
12 Q. And you knew about that because you were aware that
13 Lend Lease had had great difficulty off-loading the AUSLIG
14 building, hadn't it?
15 A. I believe it had, yes.
16
17 Q. Over many, many, many months, in late 1990 into 1991?
18 A. I'm not sure for how long, but I knew they had
19 difficulties.
20
21 Q. And you were also of the view that it was, at that
22 time, difficult for a developer to make a profit in
23 developing sites in Canberra, were you not?
24 A. Yes.
25
26 Q. That's the last dot point?
27 A. Well, it was if we couldn't sell buildings,
28 yes - that was to traditional investors, and yields were
29 moving, and things like that.
30
31 Q. The object of the exercise for developers is to
32 build, usually to sell - sometimes to hold and then sell,
33 but usually to sell?
34 A. Yes, normally to sell as soon as you can, yes.
35
36 Q. At a profit?
37 A. At a profit, yes.
38
39 Q. And you were recording under this heading "Current
40 Status", what you considered to be the state of the market
41 in those last three dot points, and other factors that
42 you'd been told were the current status in relation to
43 this particular prospect?
44 A. Yes.
45
46 Q. Then there is a heading "ALP Development Criteria
47 (Assumptions)"?

1 A. Yes.
2
3 Q. Now, from whom had you obtained the matters that are
4 listed there for the purposes of putting them into this
5 document?
6 A. I think these - after my discussion with Richard,
7 these are my assumptions as to where I thought the ALP
8 sat. This is what I went to discuss with Bob Hogg.
9
10 Q. Right. So is this the process, that you have a
11 conversation with Mr McKeon; you, as it were - and I don't
12 mean this unpleasantly - extract information that you
13 think is pertinent to the task that you think you are
14 going to be asked to be completing, and then you make a
15 note of those for the purposes of raising them with
16 Mr Hogg at this meeting?
17 A. Oh, yes. I mean, the way I approach it is to - it's
18 a development opportunity, so I looked at where it is at
19 now, where the market is at, and what are the criteria
20 that the project has to meet - the development has to meet
21 to be successful from the owner's point of view. So I
22 approach - each development I approach, I approach it in
23 the same way. No development is the same, so that's how I
24 went about this one, yes, and it had characteristics which
25 were different to other projects.
26
27 Q. Yes. And you certainly had the experience and
28 expertise to distill, if I can put it that way, the
29 critical factors from your conversations with those who
30 knew about what was required here, and to list them in
31 this fashion?
32 A. I had two years experience.
33
34 Q. Well --
35 A. Because I became branch manager for the development
36 company of Lend Lease only two years before that. So I
37 didn't have a career in development. It was a big
38 transition for me to go from Civil & Civic at the end of
39 1989, I think it was, to Lend Lease Development.
40
41 Q. Do you have any formal qualifications?
42 A. I'm a civil engineer.
43
44 Q. Do you have a degree?
45 A. In civil engineering.
46
47 Q. And you have been involved with Civil & Civic for

1 some years?

2 A. I had 20 years with Lend Lease altogether, when I
3 left, in a couple of different stints. I was in Lend
4 Lease twice. I joined Lend Lease I think in '78. I had
5 three years there. I went up to the Parliament House
6 project, with some project consultants, for three years.
7 Then I went back to Lend Lease. I was with Lend Lease
8 Development in the early 80s on the start-up of Fernhill.
9 So I had a couple of years experience there, one or two, I
10 think. Then I went back to Civil & Civic to get project
11 management experience. Then I went back to Lend Lease
12 Development.

13

14 Q. All right. Now, can we just have a look at this
15 section, "ALP Development Criteria (Assumptions)":

16

17 * *ALP are an owner builder.*

18

19 That was obviously right, and something you were well
20 aware of; is that correct?

21 A. Yes.

22

23 Q. You have recorded:

24

25 * *ALP don't have to pay for land or*
26 *development profit.*

27

28 Are the thoughts behind that that firstly they were
29 proposing to rent the ground and, secondly, proposing to
30 hold on to the property?

31 A. Yes. I understood that under their lease, you could
32 pay a land rent.

33

34 Q. Yes.

35 A. And that because they were going to own and retain
36 the building, then obviously they weren't selling it for a
37 development profit as Lend Lease would have.

38

39 Q. Yes. Then the next point that you have noted here
40 is:

41

42 * *ALP seeking income producing property ie*
43 *a good cash flow.*

44

45 Did somebody tell you that?

46 A. No, these are my assumptions.

47

1 Q. All right:

2

3 * ALP wish to retain ownership

4 long-term...

5 * ALP do not wish to sell the property for

6 development profit on completion of

7 construction.

8 * ALP do not wish to sell for capital gain

9 in the next 10-15 years.

10 * ALP do wish to develop a property which

11 will retain its value and demonstrate

12 potential for capital gain.

13 * ALP wish the project to be fully self

14 supporting financially.

15

16 Now, why did you make that assumption in this document?

17 A. Well, I didn't believe - I think it was probably

18 because I didn't think they'd want to be exposed to a lot

19 of debt.

20

21 Q. Well, had anyone told you that they couldn't support
22 further debt at that point in time?

23 A. No.

24

25 Q. And the last point that you have noted here is:

26

27 * ALP can use property as security for

28 finance raising.

29

30 Do you see that?

31 A. Yes.

32

33 Q. Now, all of those points, were they matters that you
34 ultimately raised with Mr Hogg at the meeting you had with
35 him?

36 A. I believe we went through this agenda, yes.

37

38 Q. Did you make a note of what he said about these
39 matters?

40 A. I don't know. I haven't - I don't know - I haven't

41 been through the file. If there is notes there, I did,

42 otherwise I don't know whether I did or didn't.

43

44 Q. Well, in particular, did he confirm all of these
45 points to the best of your recollection?

46 A. They were more my statements than asking him to agree

47 to them, as such. I just said, "These are my assumptions

1 as to what I think you would need out of a project".

2

3 Q. Well, did he suggest to you that you were going down
4 the wrong track in any of these respects?

5 A. I don't recall what Mr Hogg said to me at the time.

6

7 Q. Well, did you proceed after the meeting with him
8 along the lines that these assumptions were valid for the
9 purpose of the exercise that you were doing?

10 A. In as much as they would fit what we then were going
11 to do, yes.

12

13 Q. On the next page, CH94.004.0026, you have got a
14 heading "Government Needs", and four points there.

15 A. Mmm-hmm.

16

17 Q. Were they assumptions that you made from knowledge
18 you had as to what was going on in Canberra at the time?

19 A. Yes.

20

21 Q. The next section is "Financing Options". You have
22 got the first dot point:

23

24 * *negotiate a fixed rental growth*
25 *agreement with the Government.*

26

27 And then under that:

28

- 29 - *15 years*
30 - *9% growth*
31 - *option to renew*

32

33 Do you see that?

34 A. Yes.

35

36 Q. Now, had anybody told you, by the time you came to
37 prepare this document, as to what, if any, negotiations
38 had occurred between the owners and Lend Lease on the one
39 hand, and the government on the other hand in relation to
40 the terms of the likely lease?

41 A. I don't recall that they had. My only information I
42 had was back on the previous page, I believe, that - or
43 when I mentioned earlier, that - when I commented earlier
44 in my statement that Richard said - McKeon said about
45 having trouble getting a deal up and words to the effect
46 that it might fall over. But I don't believe I went
47 through progress as to where it was. I might have asked a

1 question, "What sort of rents were you offering?", or
2 something, but I don't believe I went through it in
3 detail.
4

5 Q. Where did you get the idea that you have recorded
6 here, that the agreement with the government would have a
7 15-year term, for example?

8 A. I couldn't recall that last week, where I got the
9 15 years from, but in going through some files, when I was
10 up here last week, I saw there was an advertisement in the
11 paper which I think was in my files somewhere, referring
12 to the Patents Office at Woden wanting a 15- to 20-year
13 lease. So I probably jumped on the bandwagon and said
14 "15 years is good. If the government's offering 15-year
15 leases, let's go for that." I think preceding this I
16 would have done some principal and interest cash flow
17 negotiations.
18

19 Q. What, calculations, you mean?

20 A. Calculations, yes, on a spreadsheet. I knew how to
21 do all those, and would have had an escalator, so would
22 have worked out roughly how much time it would have taken
23 to write off the debt associated with this project, et
24 cetera. So the 15 years - I knew that 10 years wasn't
25 long enough, because P&I won't support 10 years to pay off
26 that debt, to meet those criteria I'd set on the front,
27 which was to be fully self-supporting financially. So
28 that's the 15 years.
29

30 The 9 per cent growth I probably pinched from AUSLIG.
31 Sorry, you haven't asked that question. The 15 years is -
32 other than that, it was a - I don't recall where I got it
33 from. But I think I probably took advantage of the
34 Patents Office advertisement at the time.
35

36 Q. You mentioned in the course of that last answer that
37 you probably had done some spreadsheets --

38 A. Yes.
39

40 Q. -- before this meeting. Are they in that folder which
41 is MFI 2?

42 A. I'd have to go through it and check, but I don't know
43 that they would be.
44

45 Q. But would this be fair: you would have known, with
46 your experience and your particular function at the time,
47 that to pay off the principal and interest of a debt of

1 the magnitude that was likely to be involved in
2 constructing this proposed building required a period of
3 about 15 years with the interest rates likely to be
4 involved in that process as you understood it at that
5 time?
6 A. Yes.
7
8 Q. And that 10 years simply wasn't enough?
9 A. That's right.
10
11 Q. You would have known that, because those sorts of
12 relationships financially were very familiar to you at the
13 time?
14 A. Yes.
15
16 Q. Isn't it most likely that you have put 15 years in
17 there for that reason, rather than because of any
18 advertisement you had seen about the Patents Office?
19 A. Not necessarily. I mean, the market was moving
20 towards finance leases - the Tuggeranong Office Park, you
21 know, where different types of financing were being used.
22 If I had have seen the government using - calling for
23 tenders of 15 to 20 years, I believe I would have taken
24 advantage of that. That was an opportunity.
25
26 Q. All right. Sorry, I didn't mean to cut you off?
27 A. It was a combination of both, probably.
28
29 Q. But can you remember actually being aware of that
30 Patents Office advertisement?
31 A. Not until I saw it again last week.
32
33 Q. Right. The 9 per cent growth is a 9 per cent
34 year-by-year escalator in the rent figure for a 15-year
35 period, or the term of the lease as noted here, isn't it?
36 A. Yes.
37
38 Q. You said, I think, a little while ago, that you
39 probably pinched that from the AUSLIG lease?
40 A. Yes.
41
42 Q. Do you recall, and I do want to take you to this in
43 some detail later, that initially the rent review
44 provisions in the AUSLIG lease did not have fixed
45 year-by-year escalators?
46 A. I understand that was the case, yes.
47

1 Q. And that obtaining a renegotiated position, which
2 included fixed year-by-year escalators, was something that
3 Lend Lease set about doing and ultimately achieved in late
4 1990 through to 1991, about May?
5 A. I understand it achieved it, I'm not sure of the
6 dates.
7
8 Q. That's all right.
9 A. Yes.
10
11 Q. We will come to the detail of it?
12 A. Yes.
13
14 Q. Were you generally aware, when you prepared the
15 document I'm showing you, that what had been agreed in
16 respect of the AUSLIG lease at the renegotiated stage, was
17 that the rents would escalate at 9 per cent per annum, but
18 only every second year?
19 A. I can't recall that now, but I probably was at the
20 time.
21
22 Q. For, I think, a period of 10 years, which was the
23 term of the lease; is that correct?
24 A. That's correct.
25
26 Q. Was your thinking, when you made this note here, that
27 if the government had agreed to that once, they might do
28 it again?
29 A. Yes, I think that's correct.
30
31 Q. In particular, if they'd done it fairly recently in
32 relation to a Lend Lease transaction, there would be a
33 good prospect they might do it again in relation to a Lend
34 Lease-associated transaction?
35 A. Not just a Lend Lease-associated transaction,
36 probably for anybody in the market, because people would
37 use that as evidence - not as evidence, but "Say you have
38 done it out at Fernhill, so why not here?"
39
40 Q. Is this a fair statement of your reasoning process
41 that led to including that particular matter in this
42 document: you have thought it was achievable, having
43 regard to the fact that it had very recently been achieved
44 at AUSLIG?
45 A. I think that's a fair statement, yes. I can't recall
46 exactly what I thought 13 years ago, or whatever.
47

1 Q. And that you were going to use that factor - that is,
2 a fixed annual increase to the rent - at the rate of
3 9 per cent in your modelling thereafter?
4 A. Yes.
5
6 Q. On the basis that you believed that it was
7 achievable, in terms of what might be agreed with the
8 government in any lease in respect of this project the ALP
9 had in mind?
10 A. Yes. I believe it was achievable, yes.
11
12 Q. You didn't, yourself, before including this note into
13 this document, or coming to the view that you did, go out
14 and research the market about fixed rent escalators, did
15 you?
16 A. No, I don't think - I can't recall exactly, but don't
17 believe I would have. I was aware there were other leases
18 going on around Australia at this time, of this sort of
19 arrangement. I wasn't sure what the details were, but I
20 was particularly aware, I think, that the Tax Office was
21 doing deals around Australia, they had a major expansion
22 program. Certainly I didn't research it, no.
23
24 Q. The reason you didn't research it, quite reasonably
25 was, that you knew you had AUSLIG, which was very recent,
26 involving the government?
27 A. I would accept that, yes.
28
29 Q. You certainly didn't bring to bear, I suggest, in
30 your reasoning at this time, anything that was happening
31 around the country with Tax Office buildings, did you?
32 A. In this meeting, you mean?
33
34 Q. No, in preparing this note.
35 A. No, probably not, no.
36
37 Q. Nor, indeed, in the meeting that followed?
38 A. No, probably not, in that I didn't know the details
39 of those agreements.
40
41 Q. No. It is fair to say, isn't it, that the sole
42 source of your note and your reasoning that led to the
43 note and your subsequent inclusion of this sort of growth
44 factor in your modelling was the AUSLIG lease?
45 A. Yes. I think also, though, the Sydney part of Civil
46 & Civic was working on finance deals around Australia, so
47 I think there was an environment of finance deals around.

1 I don't know how much they influenced my thinking.

2
3 I was aware that there was a culture in the
4 government of changing over, using what I call finance
5 leases for financiers as opposed to the capital works
6 programs. They were changing - so it wasn't just in
7 Canberra, they were changing elsewhere, but I didn't know
8 the detail.

9
10 Q. So there was a general appreciation of the matters
11 you have just referred to?

12 A. Yes, because I think the government was asking for -
13 inviting expressions of interest all around the country
14 for different projects.

15
16 Q. All right. Would you be good enough to help us with
17 your understanding of the expression "finance lease" as
18 you have just used it in that last answer?

19 A. Well, I don't know the - I think the Department of
20 Finance defines those things, and operating leases.

21
22 Q. I think the best we can do is your understanding of
23 it.

24 A. A finance lease, to me, was, as opposed to a market
25 review lease, was a lease which financiers required which
26 took away a lot of the risks associated with owning
27 property. Now, they would be risks which a traditional
28 building owner or equity owner would assume. They would
29 be a problem with the structure of the building, if there
30 was a structural defect, as happened in Canberra with the
31 Silverton Building - the tenant left, there was an empty
32 building; inherent defects, for instance, in design, risks
33 for those sort of issues; abatement risks - that is, the
34 tenant can come and say, "Sorry, but the services aren't
35 working properly, so I'm leaving the building and cutting
36 off the rent"; all the risks which probably cause a loss
37 of revenue in the building, a financier didn't want.

38
39 Probably another way of saying it is that a financier
40 wanted a rental stream which is more like a bond. So it
41 was just - they wanted the money and no property risks.
42 So guaranteed cash flow and guaranteed money back at the
43 end. That's --

44
45 Q. Is this a fair description: That was a culture that
46 was developing around about this time?

47 A. I think that is, yes, a fair description, yes.

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Q. And developers were attempting to meet the requirements of financiers, as you briefly described them in your last answer?

A. Yes. Yes.

Q. And they were seeking to reeducate the tenant market to that way of thinking at that time?

A. I think so. I think we were all being reeducated - on some of the conditions they imposed on financiers.

Q. Because whatever conditions they imposed on the developer were, for the most part, going to find their way into discussions with a proposed tenant, weren't they?

A. Yes. They had to, yes.

Q. Inevitably, yes, that's commercial reality, isn't it?

A. Yes. In some ways the developer in those arrangements really becomes a broker between the tenant and the financier. At the end of the construction period the developer has gone, apart from his long term guarantees he might have to give, and the parties that are left there is the financier, if it's a special purpose vehicle, and the tenant.

Q. And who ends up with the ownership of the building at the end of the arrangement?

A. I think there would be probably options in that arrangement. I later became aware that the Commonwealth, for instance, on Tuggeranong Office Park - I didn't realise at the time - they wanted owner - they got ownership at the end. Whether that was initiated by the government or initiated by the financier saying, "We don't want an office building of 30,000 metres down in Tuggeranong which might be empty in 30 years time which needs refurbishing," I don't know. I remember reading in a document the other day relating to a BZW document, no, relating to a Patents document in Canberra with some advice from Des Jordan saying he did not know whether the government, in relation to the Patents Office, would be asking for a reversionary ownership or not, or wanted a lease extension at the end. So the issue of ownership was a separate issue to the cash flow issue and the financing of the debt issue.

Q. And was this culture, or development of ideas, if I

1 can call it that, akin to what was happening in relation
2 to the acquisition of goods and chattels, on the one hand
3 through finance leases and the other hand operating
4 leases?

5 A. Sorry, I'm not sure what you are --
6

7 Q. Is it a similar process that was being undertaken -
8 that is to say that leases were being viewed - that is
9 leases of real estate - as a method of finance at the
10 time?

11 A. I think the - yes, or another way of saying that is
12 that the financing market was understanding the strength
13 of the Commonwealth lease, if it was structured the right
14 way. The Commonwealth is a tenant, a very strong tenant
15 to have, but only under the finance terms that financiers
16 wanted; not a market review lease, yes.
17

18 Q. You have next noted under this heading:

19
20 ** secure development funding against fixed*
21 *Commonwealth guaranteed cash flow.*
22

23 Do you see that?

24 A. Yes.
25

26 Q. And that was part of what you regarded as one of the
27 important aspects of the financing options that had to be
28 considered?

29 A. Yes.
30

31 Q. Then there are some other matters noted in the next
32 three dot points, and then the last one says:

33
34 ** decide on interest only or principal and*
35 *interest payments.*
36

37 That was a matter that you wished to have Mr Hogg think
38 about and discuss, consider and have decided upon; is that
39 right?

40 A. Yes, yeah, I did. The reason that's important as an
41 issue is that because of the high interest rates at the
42 time, the interest payment in the first year was going to
43 be higher than the revenue for the building - the interest
44 rate was going to be higher. Therefore, my view was that
45 maybe in the first years you pay only the interest-only
46 option. But it is because - because the interest is
47 higher than the revenue in year one, it is why you need

1 the escalator to quickly get back - to get the situation
2 where the revenue coming from the building is higher than
3 the interest payments. Otherwise you are capitalising
4 interest all the time and the debt mounts so much it
5 becomes a non-performing loan after a while. So you
6 quickly had to get an escalator with a suitable growth
7 rate to get - reach that point on the curve where your
8 repayments are positive, not negative.

9

10 Q. If the deal was to be done upon the assumptions you
11 had set out?

12 A. Yes.

13

14 Q. Then, I think, you have listed options 1 and 2 as
15 ways and means of achieving what appears above them; is
16 that a fair way of putting it?

17 A. Yes.

18

19 Q. Then development risks are noted.

20 A. Yes.

21

22 Q. Is the extent of the document just these two pages?

23 A. I think it was, but then we probably had more of a
24 discussion, and probably the key things I recall saying to
25 Mr Hogg on that day, was, I believe, that if he got this
26 sort of a structure, he could go it alone on the
27 development. I recall myself saying that that day,
28 nothing against the ACT, I just said, "If you get this
29 sort of structure there is no reason you can't do this
30 development in your own right. You don't need an equity
31 partner. You don't need other partners, because you are
32 funding this through the cash flow."

33

34 Q. If you would not secure a lease which had sufficient
35 levels of rent in it, both at the beginning and by way of
36 escalation, and you therefore couldn't secure an
37 appropriate financing transaction, you would have to have
38 an equity partner of some kind, if the deal was to get up
39 and running?

40 A. Yes, you would have had to have an equity partner of
41 some sort, but that then would have reduced - an equity
42 partner would probably want a return on his equity, so it
43 reduces the amount of income stream to go to paying debts,
44 et cetera, et cetera.

45

46 Q. But a couple of things are reasonably clear, aren't
47 they, in relation to this kind of transaction: one is

1 that whoever the financier was to be, that entity was
2 going to deal on what one might call commercial terms in
3 relation to the project, notwithstanding that it was the
4 ALP that was the owner?

5 A. Yes.

6
7 Q. If there was no equity coming from an equity partner,
8 or the ALP itself, then the rent that had to be achieved
9 in the Commonwealth lease had to be sufficient to meet the
10 criteria you had set out in this document?

11 A. Correct.

12
13 Q. Criteria which were, in essence, that the principal
14 and interest be paid off over 15 years, and that each
15 year, year by year, there would be thrown up a surplus for
16 the ALP to use as it wished?

17 A. At that stage I didn't envisage a surplus. I think I
18 mentioned that in the "Principal and Interest Option 2".
19 Point 2, says, from my calculations, no income to the ALP
20 for 14 years. That's on page 26 there, Option 2.

21
22 Q. But what about - well, that's if principal and
23 interest was involved?

24 A. Yes. I mean, I hadn't thought at that stage of the
25 ALP taking a cash flow on the way through. All I'd done
26 is worked out - I didn't know how the ALP wanted to
27 structure it. All I was saying was if you had a 15-year
28 rent stream, 9 per cent growth, and the interest rate at
29 the time, you would be able to fully fund the development.

30
31 Q. Yes. If you wanted to draw a positive cash surplus
32 out for a period longer than you had contemplated here,
33 then you would have to do a better deal on the rent than
34 you had in mind; would you agree?

35 A. You can conclude that, yes. I haven't put it in
36 here.

37
38 Q. No, no. I'm talking about it, though, if that was
39 the case. In other words, what I'm putting to you is, as
40 you, I think, well understood then, well understand now
41 and agree, that the critical matter here, to make this
42 thing work, was the level of rent that one would be able
43 to achieve in negotiations with the Commonwealth?

44 A. Yes.

45
46 Q. What you were doing at this stage was to determine,
47 fairly broadly and fairly roughly, what the minimum

1 requirements of any commercial arrangement with the
2 government by way of lease needed to be?
3 A. Yes.
4
5 Q. If they did better than those minimum levels, then
6 that money was going to come by way of surplus,
7 ultimately, to the ALP, wasn't it?
8 A. Yes, yes. It would have.
9
10 Q. It was a perfectly rational way to behave if you are
11 in the position of someone trying to develop a site as
12 they were at the time, wasn't it?
13 A. I believe it was, yes.
14
15 Q. Provided that in dealing with the other party to the
16 proposed lease, they could achieve the sorts of parameters
17 that you had in mind needed to be achieved in order to
18 make the deal work?
19 A. Yes.
20
21 Q. In other words, it is no good factoring in rents and
22 escalations which were completely and utterly
23 unachievable?
24 A. No, there would be little point in that.
25
26 Q. You would go nowhere?
27 A. It was a key issue for us - no, I agree with that.
28
29 Q. You go nowhere?
30 A. Yes.
31
32 Q. On the other hand, knowing precisely where you needed
33 to go was a critical matter in approaching any discussion
34 or negotiation about what those lease terms should be, at
35 least from the owners' point of view, wasn't it?
36 A. Yes.
37
38 Q. Your function became, very quickly, providing
39 information to the owner/developer as to what it was that
40 was required as a minimum in order to achieve the
41 objectives that they wanted to achieve in the transaction,
42 wasn't it?
43 A. Yes. Probably the extra point here is that I was
44 suggesting to them they approach a different type of
45 financier than the ones they'd had before. They'd
46 probably been to mortgage financiers before. That's when
47 Richard came and said they couldn't put a deal together.

1 I assume he'd been to that sort of financier. What I am
2 saying here, you would have to go and - go to financiers
3 and see who could fund projects based on secured cash
4 flows.
5
6 Q. At this stage, as far as you know, they had no
7 financier lined up?
8 A. No, quite the contrary - the project was on the edge.
9
10 Q. Yes.
11 A. Mmm.
12
13 Q. And there was no particular financier sitting there
14 telling them what it required at this point in time, was
15 there?
16 A. Not to my knowledge, no.
17
18 Q. You were providing, as it were, advice and assistance
19 in developing a structure that you felt would meet the
20 criteria that a financier likely to be interested in this
21 project would require?
22 A. Yes, only in the bare principles.
23
24 Q. Of course, at this stage.
25 A. The money, the dollar side, yes.
26
27 Q. But you were the person who was able to do this kind
28 of work, having done it for Lend Lease Developments and
29 being, without flattering you too much, very good at it?
30 A. Thank you.
31
32 Q. It is true, isn't it?
33 A. True. Yeah, I think I pride myself on learning fast
34 about these financial transactions.
35
36 Q. Yes.
37 A. Mainly from getting hold of - on previous
38 developments, be it the AUSLIG lease, or whatever, it was
39 amazing just really to get the presentations from the
40 financial people, and I always asked for their cash flows,
41 and that taught you a lot, quickly, how they did it. It
42 was pretty simple.
43
44 Q. It was, although for someone like you who perhaps
45 thought about them more than others, you were able to
46 learn a great deal about the way in which financiers
47 approached these transactions by having a look at their

1 modelling and cash flows, weren't you?
2 A. Yes. Lend Lease had it's own people who did a lot of
3 financing and cash flowing as well. So it was probably a
4 mix of both, and the external finances, yes.
5
6 Q. And you were the person that was chosen to try to
7 assist the ALP to get this project up in the area of
8 financial structuring and dealing with financiers, weren't
9 you?
10 A. Well, I think that had eventuated. Initially I just
11 went over with Richard to give some advice. I mean, my
12 core business was not developing buildings for other
13 people, it was developing Lend Lease's sites. So I
14 probably got drawn into this more than I thought, but I
15 was happy to do it.
16
17 Q. The sort of things you normally did were for Lend
18 Lease itself, rather than third parties; is that right?
19 A. That's correct.
20
21 Q. Yes.
22 A. And we had some other sites in Canberra at the time.
23 We had some other sites in Civil, which we had since
24 1988/1989. So we had a major development ourselves that
25 was a \$40m to \$60m development, plus the Fernhill project.
26
27 Q. Would you have a look at tab 2, ALP.004.0244.
28 A. Yes.
29
30 Q. It is a letter from Mr Hogg to you of 22 August 1991.
31 May we presume you received that letter?
32 A. Mmm-hmm. Yes.
33
34 Q. And it was, in effect, a letter of authority for you
35 to deal with the Commonwealth Bank on behalf of the ALP in
36 relation to proposed financing for this project?
37 A. Yes.
38
39 Q. Did you receive other letters from Mr Hogg of that
40 type to deal with other financiers, or was there no need
41 for that, you simply set about doing so without formal
42 letters?
43 A. I don't recall whether there were other letters or
44 not, but I certainly set about seeing other financiers.
45
46 Q. By 22 August, had your role come to the point where
47 you were now, in effect, trying to both structure this

1 deal and obtain the appropriate finance in accordance with
2 that structure on behalf of the ALP?

3 A. From looking at documents last week from letters back
4 from the financiers addressed to me, I must have been out
5 there, but I don't particularly recall doing all that
6 work. But I accept that I did.

7

8 Q. Could you have a look at a document in your green
9 file, MFI2. It has a barcode of JM.001.001.0088-89. It
10 appears to be a two-page memo dated 21 August 1991 from
11 you to Mr Nicholson and Mr McKeon, and I would like to see
12 if you can find it in that folder. In the meantime, we
13 will have it brought up on the screen.

14

15 THE COMMISSIONER: What is the source of the "JM" prefix?

16

17 MR BEECH-JONES: That is Freehills'. We put that on.
18 That is our code.

19

20 THE WITNESS: I missed the number.

21

22 MR FOSTER: That's all right. I don't blame you, it is a
23 very long number.

24

25 Q. It is JM.001.001.0088. It is a memo from you to
26 Nicholson and McKeon of 21 August 1991.

27

28 THE COMMISSIONER: Is that because it is Mr McFadden's
29 documents, Mr Beech-Jones, that it has "JM" rather than
30 "FREE"?

31

32 MR BEECH-JONES: "FREE" is a code put on by the
33 Commission to documents produced by Freehills. I think
34 "JM" is a code put on by Freehills because it is a
35 document that comes from Mr McFadden.

36

37 THE COMMISSIONER: That's what I wanted to know, yes,
38 thank you very much.

39

40 THE WITNESS: Yes, I have that document.

41

42 MR FOSTER: Q. All right. May we take it that's a memo
43 you wrote to Mr Nicholson and Mr McKeon on 21 August?

44

45 A. Yes.

46

47 Q. You have set out what you describe as a proposition
for the following arrangements, as being "appropriate to

1 assist Civil & Civic securing the project". Then you set
2 it all out?
3 A. Mmm-hmm.
4
5 Q. You have got in the third dot point:
6
7 *LLD will assist in provision of advice to*
8 *the following independent advisors to be*
9 *engaged by ALP.*
10
11 And they are all listed?
12 A. Yes.
13
14 Q. Over the page you raise the matter of an LLD fee?
15 A. Yes.
16
17 Q. So it seems that by the date of this document you had
18 more or less accepted this larger role that I put to you a
19 little while ago?
20 A. It does from that, yes.
21
22 Q. And --
23 A. That was my proposal.
24
25 Q. Would you agree that you had probably already even
26 started working in that capacity by then?
27 A. I believe so, yes.
28
29 Q. Did you make contact with Barclays Zoetewedd
30 Australia Limited in this connection?
31 A. I believe I did, yes.
32
33 Q. And did you receive a proposal from that organisation
34 by letter dated 29 August 1991, and it is in your folder
35 at tab 3. It is ALP.006.0004 through to 0008.
36 A. Sorry, which folder?
37
38 Q. The tab.
39 A. Tab 3?
40
41 Q. Yes.
42 A. Sorry, I have got the wrong file.
43
44 Q. It is probably in the other one as well.
45 A. Yes.
46
47 Q. Now, you, of course, approached Barclays in August,

1 did you not?

2 A. Yes.

3

4 Q. It would appear it was perhaps even as early as late
5 July, because --

6 A. Yes.

7

8 Q. -- what's referred to here is an earlier letter from
9 them of 6 August; do you see that?

10 A. Yes.

11

12 Q. They set out a proposal in this letter, do they not?

13 A. They do, yes.

14

15 Q. On page 0006, next to "Building Owner" about halfway
16 down.

17

18 *A detailed pre and post cash flow is*
19 *attached.*

20

21 Do you see that?

22 A. Yes, I see that.

23

24 Q. Then a long-term debt description, which includes, on
25 the next page:

26

27 *All debt would be non recourse to the*
28 *owner.*

29

30 A. Mmm-hmm.

31

32 Q. Then on page 0007 this is said next to "Property
33 Lease":

34

35 *The owner would lease the property to the*
36 *Commonwealth of Australia.*

37 *Term: 15 years*

38 *Rent: A net rent of \$2.33m PA monthly in*
39 *advance but adjusted to a semi annual in*
40 *arrears equivalent.*

41 *Rent Indexation: 9% PA for 15 years.*

42 *Building expenditure:...*

43

44 There is a note next to that, and also something about
45 repairs under that. Now, did you tell the Barclays person
46 you were dealing with, back in early August or late July,
47 that these would be the terms of the Commonwealth lease?

1 A. I believe I would have told them they would be the
2 indicative terms of the Commonwealth lease and what we
3 were trying to negotiate, we would endeavour to negotiate.
4

5 Q. Did you have any idea at the time you passed that on
6 to Barclays whether or not there had been any discussions
7 between the developers and owners on the one hand and the
8 Commonwealth on the other about these terms and these
9 matters listed here?

10 A. No, I don't recall what the status was between the
11 Commonwealth and the owner, no.
12

13 Q. But, you had conveyed, nonetheless, to Barclays that,
14 using your language, the indicative terms of the proposed
15 lease would be the terms set out in this letter?

16 A. Yes. I would have had a reason for doing that, in
17 that I would think that we were trying to put together -
18 given that Richard McKeon said the project was virtually
19 dead, we would have been trying quickly to find out what
20 we could achieve in the marketplace from financiers. So I
21 would have had to assume some indicative terms and that
22 was a basis on which we went off and saw them - I went off
23 and saw them.
24

25 Q. I'm not criticising you for that, not at all.

26 A. Thank you.
27

28 Q. I am trying to establish that that's what happened.
29 It is what happened, isn't it?

30 A. I think that's what happened. I'm trying to recall
31 what happened. I think that's what happened.
32

33 Q. And you can see next to the word "Rent" on page 0007,
34 there is an "adjustment to a semi annual in arrears
35 equivalent".

36 A. Mmm-hmm.
37

38 Q. What was meant by that, do you recall?

39 A. Well, I believe that would have been a condition
40 introduced by Barclays in their return proposal back to
41 us.
42

43 Q. All right. And it is noted, over the page, that:

44
45 *Final negotiations on the BZWA form of*
46 *lease are currently being undertaken with*
47 *the Commonwealth.*

1
2 A. Yes - noted, yes.
3
4 Q. Could you have a look, please, at - I will have it
5 brought up on the screen, but I think it is also in your
6 green folder - document JM.001.001.0086, which is a memo
7 from you to Mr Nicholson and Mr McKeon of 6 September
8 1991.
9 A. Yes, I have that document.
10
11 Q. And this is another document where you are trying to
12 nail down, if I can put it crudely, LLD's role and the
13 payment for it; would that be fair?
14 A. Yes. I think - I haven't read it yet.
15
16 Q. Please do. Take your time. Stuart Nisbett was the
17 chief executive of Lend Lease Development at that stage,
18 wasn't he?
19 A. I don't think so. I think - no, I think Joe Banek of
20 Lend Lease Development. I think Stuart Nisbett was the
21 financial advisor, or a similar role, I think.
22
23 Q. Would you mind just reading that, and I will then ask
24 you a question. Have you had a chance to read that?
25 A. I'm reading the second page.
26
27 Q. Thank you.
28 A. Yes.
29
30 Q. You have set out what you understand the objectives
31 to be of the ALP, and included within those in this
32 document is "maximise cash flow"; do you see that?
33 A. Yes.
34
35 Q. Was that something that Mr Hogg had conveyed to you
36 directly?
37 A. I can't recall.
38
39 Q. Had you met with him on more than one occasion
40 between July and 6 September?
41 A. That, I honestly can't recall.
42
43 Q. The second-last dot point is:
44
45 * *minimise JCH's exposure to commercial*
46 *risk in the long term and short term*
47 *through the use of non recourse financing.*

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A. Yes.

Q. And:

** secure lease term satisfactory to the Commonwealth, financiers and JCH.*

Were those matters that you had understood from Mr Hogg to be objectives or were they your assumptions that you were proceeding with?

A. Well, I think there would have been agreement between us that this is what's - the way we want the project to go, yes.

Q. Yes. It indicates that by this stage there was also a plan or a desire to have a precommitment lease agreement in respect of the Commonwealth lease?

A. Yes, definitely.

Q. Then over the page you have set out whom you understand to have been retained and what their functions were?

A. Mmm-hmm.

Q. Did you know that Mrs Morris was involved in this matter in respect of the dealings with the owners and Lend Lease on the one hand, and the Commonwealth on the other?

A. I believe I would have, yes.

Q. You haven't listed her in this document, have you?

A. Not in those two pages, I don't believe I have.

Q. And under Mr McCann's role, you seem to have included the lease terms and conditions, would you not agree?

A. Yes.

Q. Was this the position: you thought that it was Mr McCann at this point who would deal with the Commonwealth as to the lease terms and conditions that might be required?

A. I think I was trying to sort out my role with Civil & Civic, and it probably took me a while to come to grips with the fact that the ALP had these other organisations on board, who were key advisers and I had to accept that they were involved in the project - probably in discussions with Glen Nicholson more than anything -

1 because, yeah, there were these other organisations
2 involved.
3
4 Q. By the end of August, had you approached anyone other
5 than Barclays in respect of this?
6 A. I can only tell that by looking at the dates of
7 letters which have come back to us to - working back from
8 that. I just can't recall whether I did or I didn't.
9
10 Q. Well --
11 A. I probably would have. I think I would have gone to
12 Sydney and seen quite a few in the one day, type of thing.
13
14 Q. Would that have been in early August or late July?
15 A. Probably similar sort of time to when I went and saw
16 Barclays.
17
18 Q. Right. Which seems to have been late July, early
19 August, does it not?
20 A. I think so, but I can't guarantee that.
21
22 Q. In any event, we have this letter from Barclays.
23 Could I just move on from that to a letter which you wrote
24 on 12 September 1991, and it is JM.001.001.0358. It is in
25 your green file as well.
26 A. What tab would be that under? Is it under a tab?
27
28 Q. It is not in a tab.
29 A. Sorry. So it is 385?
30
31 Q. 358. It will come up on the screen in a moment. You
32 can have a look at it there as well. It is dated
33 12 September 1991. I will give you a chance to read that
34 and let me know when you are ready.
35 A. Yes, I have read that.
36
37 Q. Had you organised for someone from Barclays to come
38 to Canberra and meet with the ALP and others in relation
39 to this letter that had been written on 29 August?
40 A. I think that can be inferred from that letter, yes.
41
42 Q. Was it hoped, as far as you understood it, that by
43 the time that meeting took place there would be in the
44 possession of the owner/developers a letter from the
45 Commonwealth setting out the terms upon which it was
46 prepared to enter into a lease?
47 A. Yes.

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Q. Was that something that you at least considered was necessary in order to progress discussions with Barclays?

A. Yes, if we had a letter from the Commonwealth we could proceed with a lot more certainty, yes.

Q. Had you arranged for any other financiers to come to Canberra to talk to the ALP in that week of around about 16 September 1991?

A. I'm not sure of that.

Q. Did you know, yourself, at what stage any discussions or negotiations in respect of lease terms with the Commonwealth had reached by this date?

A. I probably would have been aware of where the discussions were at, but I think other people were doing that.

Q. Of course they were.

A. Yes.

Q. You did not ever engage in lease-term discussions with Commonwealth representatives, did you?

A. I don't believe I did. I might have attended a meeting or two, but I didn't initiate the negotiations.

Q. No. But was it your impression that they, whoever it was who was negotiating on behalf of the ALP/Lend Lease, were seeking to secure terms which matched the indicative terms you had informed the financiers of as long ago as late July, early August?

A. I believe that would have been happening, yes.

Q. Those terms or better?

A. Or better - or - yes.

Q. The position by 12 September had been reached, had it not, that it was now important, in order to progress financing discussions, to have something from the Commonwealth itself that would indicate what terms it was prepared to agree to?

A. Yes, that would be most meaningful to the financiers, yes.

Q. And that having indicative indications from only one side - that is, the developers/owners - would no longer be sufficient?

1 A. That's correct.
2
3 Q. In any event, you wrote this letter because the
4 letter that was expected from the Commonwealth had not
5 then arrived, and you thought it was best then to postpone
6 the meeting?
7 A. Correct.
8
9 Q. Were you aware that towards the end of September 1991
10 there was to be a National Executive meeting of the ALP?
11 A. I don't recall whether I was aware of that or not.
12
13 Q. Did you attend that meeting?
14 A. With the National Executive of the ALP?
15
16 Q. Yes.
17 A. No.
18
19 Q. Did you attend any meetings with the finance
20 committee of the ALP?
21 A. I don't believe so, no.
22
23 Q. Were your dealings with the ALP confined to dealing
24 with Mr Hogg and Mr Gray?
25 A. Mr Gray?
26
27 Q. Yes.
28 A. I believe they were, yes, and I recall only having a
29 few meetings with Mr Hogg. I said earlier, I only really
30 recall one, the first one.
31
32 Q. Well, you are not the sort of person who needed to be
33 closely supervised in terms of the tasks you were
34 undertaking here, were you?
35 A. In relation to this?
36
37 Q. Yes.
38 A. Closely supervised?
39
40 Q. You weren't the sort of person that needed to be
41 closely supervised by your client?
42 A. No, I wouldn't think so.
43
44 Q. No, you have plenty of initiative?
45 A. Yes.
46
47 Q. And you were exercising it, at the time, on this

1 transaction?

2 A. Yes.

3

4 Q. Did you ever see the document which is at tab 4 of
5 the documents referred to in your statement, which I think
6 is referred to in paragraph 31, it is ALP.009.0001-0040.
7 It is the project feasibility report.

8 A. I don't believe I had seen it, but I may have seen
9 it. But I think I said I don't believe I had seen it.

10

11 Q. Did you have a chance to look at that in recent
12 times, so that you could satisfy yourself about that?

13 A. I had a look at it last week, or a week before, yes.
14 I still didn't recall having seen it. I recall at some
15 stage, I think, seeing a part of it, because I think I
16 have got the - I might have in my file somewhere the Noel
17 McCann valuation, I think. If it is this valuation, I'm
18 not sure. As I said, I haven't been back through that
19 file for a long time, but I didn't recall this - this
20 assessment, no.

21

22 Q. You don't recall seeing material in it that was
23 prepared by you; is that the position?

24 A. Well, I don't know - didn't know which material in
25 there was prepared by me.

26

27 Q. I'm not suggesting it was. I'm merely trying to
28 secure an answer as to whether or not any material in
29 there was prepared by you for someone and then ultimately,
30 as best as you can tell, found its way in there. I'm not
31 suggesting that happened, but --

32 A. I don't think I did see it because, I think, from
33 memory, again it is only last week, this document was put
34 together - it must have been only a day or two before
35 those executive meetings, because I think they were
36 waiting on, having just seen what date those executive
37 meetings were, a week or two ago, and the date of the
38 letter of intent, it all happened very quickly. So I can
39 imagine Noel McCann, or whoever pulled the document
40 together, was a bit short on time. I think it says in
41 there the APG letter, to Mr McCann, was dated
42 17 September, and I think I read somewhere where the
43 finance committee meeting was 18 or 19 and the executive -
44 it sort of happened very quickly. So there is probably no
45 reason why they needed to show it to me.

46

47 Q. All right. Would you mind in this context just

1 Looking at CH94.004.0055 through to 0060.
2 A. Where is that document, sorry?
3
4 Q. It is the page headed "Project Financing". Does that
5 help you to locate it within the document?
6 A. Sorry, within that document?
7
8 Q. Yes.
9 A. What number was it again? "Project financing"?
10
11 Q. Yes.
12 A. 0030?
13
14 Q. 0055. That's a different numbering system. It is,
15 yes, 0030.
16 A. Yes, I have got that page.
17
18 Q. You will see the pages following that appear to have
19 been prepared by Coopers & Lybrand?
20 A. Yes.
21
22 Q. Had you yourself had any dealings with anyone from
23 Coopers & Lybrand before around about 20 or so September
24 1991 in relation to financing options for this project?
25 A. I had meetings with Michael Pahlow and I think
26 another gentleman, I think Laird Stewart, but the actual
27 date of that meeting, I can't recall.
28
29 Q. Was it before the ALP National Executive meeting in
30 September of 1991?
31 A. I'm not sure.
32
33 Q. Did you give to them any of your financial modelling
34 or spreadsheets?
35 A. I discussed the project with them. I'm not sure what
36 I gave them.
37
38 Q. Is the material that appears in this section of this
39 report, which has the Coopers & Lybrand name on it,
40 material, as best as you can tell, based upon work that
41 you had done or given to them or provided to them, or is
42 it unrelated to things that you may have done, or can't
43 you tell?
44 A. I'd have to read it.
45
46 Q. Please do.
47 A. There is a chance that some of it is my information.

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THE COMMISSIONER: Mr Foster, it probably relates to him.
You mean independent of?

MR FOSTER: I do. What about if I return to that on
Monday, when I have got a clearer mind, if the
Commissioner pleases.

THE COMMISSIONER: We all will. Are you able to be back
here on Monday morning?

THE WITNESS: Yes.

THE COMMISSIONER: Thank you, Mr McFadden. We will be
resuming at 10 o'clock on Monday.

**AT 4PM THE COMMISSION WAS ADJOURNED TO MONDAY, 6 SEPTEMBER
2004 AT 10AM**